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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 709

VIRGINIA ELECTRIC AND POWER COMPANY,
PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1943.

CERTIORARI GRANTED ~~FEBRUARY~~ March 15, 1943.

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[fol. 1]

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

Nos. 25 and 26

NATIONAL LABOR RELATIONS BOARD, Petitioner,

25 vs.

VIRGINIA ELECTRIC AND POWER COMPANY

NATIONAL LABOR RELATIONS BOARD, Petitioner,

26 vs.

THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC AND POWER COMPANY

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

OPINION—December 22, 1941

Mr. Justice MURPHY delivered the opinion of the Court:

Upon the usual proceedings [1] had pursuant to section 10 of the National Labor Relations Act [2] the Board made substantially the following findings of fact:

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[1] These proceedings were instituted on charges and amended charges filed in 1937 and 1938 by the Transport Workers Union of America, affiliated with the Congress of Industrial Organizations, by the Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, and by the International Brotherhood of Electrical Workers, the latter two being affiliated with the American Federation of Labor. The complaint, as amended, charged that the employer, respondent in No. 25, had engaged in unfair labor practices within the meaning of section 8 (1), (2), and (3) of the Act; 29 U. S. C. § 158 (1), (2), and (3). The Independent Organization of Employees of the Virginia Electric and Power Company, respondent in No. 26, was allowed to intervene with respect to the 8 (2) charge, was represented by counsel and participated throughout the proceedings.

[2] 49 Stat. 449; 29 U. S. C. § 151 *et seq.*

For years prior to the events in this case the Virginia Electric and Power Company (hereinafter called the Company) was hostile to labor organizations. From 1922, when a strike was unsuccessful by a nationally affiliated union,[3] until the formation of the Independent Organization of Employees (hereinafter called the Independent) in 1937 there was no [fol. 2] labor organization among its employees. Shortly after the enactment of the National Industrial Recovery Act in 1933, Holtzclaw, the president of the Company, spoke to the employees and stated that any organization among them was "entirely unnecessary". Until his death in May 1937 the Company utilized the services of one Walters, an employee of the Railway Audit and Inspection Company who prior to the effective date of the Act admittedly furnished a report on the labor activity of the employees to the Company. In 1936 Bishop, Superintendent of Transportation in Norfolk, interrogated employees concerning union activities. On April 26, 1937, shortly after the Act was upheld,[4] and an A. F. of L. organizer had appeared, the Company posted a bulletin[5] throughout its operations

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[3] Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America.

[4] National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1, and companion cases.

[5] "April 26, 1937.

To the Employees of the Company:

As a result of recent national labor organization activities and the interpretation of the Wagner Labor Act by the Supreme Court, employees of companies such as ours may be approached in the near future by representatives of one or more such labor organizations to solicit their membership. Such campaigns are now being pressed in various industries and in different parts of the country and strikes and unrest have developed in many localities. For the last fifteen years this company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other, and during this period there has not been any labor organization among our employees in any department, so far as the management is aware. Under these circumstances, we feel that our employees are entitled to know certain facts and have a statement as to the Company's attitude with reference to this matter.

appealing to the employees to bargain with the Company directly without the intervention of an "outside" union, and thereby coerced its employees. In response to this [fol. 3] bulletin several requests for increased wages and better working conditions were received.[6] The Company decided to withhold action on those requests and directed its employees to select representatives to attend meetings at

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The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary. Certainly, there is no law which requires or is intended to compel you to pay dues to, or to join any organization.

This Company has always dealt with its employees in full recognition of the right of every individual employee, or group of employees to deal directly with the Company with respect to matters affecting their interests. If any of you, individually or as a group, at any time, have any matter which you wish to discuss with us, any officer or department head will be glad, as they always have been, to meet with you and discuss them frankly and fully. It is our earnest desire to straighten out in a friendly manner, as we have done in the past, whatever questions you may have in mind. It is reasonable to believe that our interests are mutual and can best be promoted through confidence and cooperation.

(Signed) J. G. HOLTZCLAW,
President."

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[6] Included in those requsets was a petition from a majority of the Norfolk transportation employees which was the result of two meetings on Company property during working hours on May 11, 1937, in response to unsigned notices placed in the dispatcher's office by A. R. Ruett, a car operator. Both Ruett, and R. E. Elliott, who assumed the leadership in those meetings, testified that Superintendent Bishop had urged them to form an inside organization after warning them against the C. I. O. Bishop denied this, and the Board made no finding.

which Company officials would speak on the Wagner Act. These representatives met in Norfolk and Richmond on May 24 and were addressed by high Company officials who read identical speeches [7] stressing the desirability of form-

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[7] "A substantial number of its employees representing various departments and various occupations have approached the Company with the request that the Company consider with them the matter of their working conditions and wages. In other words, they have requested collective bargaining. The Company's position with respect to this was recently stated in a posted bulletin.

"In a company such as ours, if an individual operator, for example, should ask for himself better working conditions or wages, this Company could not comply with his request without also making the same concessions to other similar operators. In such a case the operator who appealed individually would, as a practical matter, be bargaining collectively for all of his group, which is not the logical procedure.

"This Company is willing to consider the requests mentioned above but feels that, in fairness to all of its employees and to itself, it should at the same time consider other groups who have not yet come to it. If the approaching negotiations are to be intelligent and fair to all properly concerned, they should be conducted in an orderly way, and all interested groups should be represented in these discussions by representatives of their own choosing, as provided in the Wagner National Labor Relations Act, which provides as follows:

'SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.'

"The Wagner Act applies only to employees whose work is in or directly affects interstate commerce and to companies engaged in interstate commerce. Counsel for this Company advise us that in their opinion the provisions of the Act do not apply to local transportation employees, to gas employees in Norfolk, or to certain strictly local employees of the light and power department. In spite of this, the

ing a bargaining agency. At the Richmond meeting it was announced that any wage increase granted would be retroactive to June 1. By the substance of the speeches and the mechanics of the meetings the Company gave impetus to [fol. 4] and assured the creation of an "inside" organization and coerced its employees in the exercise of their rights guaranteed by section 7 of the Act. Meetings, arranged with the cooperation of Company supervisors, on Company property and, in some instances on Company time, followed, at which the May 24 speeches were reported to the men who voted to form an "inside" organization and selected committees for that purpose. These committees met on Company property until June 15 when the constitution of the Independent was adopted.

While the Independent was in the process of organization, Edwards, a supervisor, kept meetings of a rival C.I.O. union under surveillance and warned employees that they

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Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make.

"The petitions and representations already received indicate a desire on the part of these employees at least to do their own bargaining, and we are taking this means of letting you know our willingness to proceed with such bargaining in an orderly manner. In order to progress, it would seem that the first step necessary to be taken by you is the formation of a bargaining agency and the selection of authorized representatives to conduct this bargaining in such an orderly manner.

"The Wagner Labor Act prohibits a company from 'dominating or interfering with the formation or administration of any labor organization or contribute (*sic*) financial or other support to it.'

"In view of your request to bargain directly with the Company and, in view of your right to self-organization as provided in the law, it will facilitate negotiations if you will proceed to set up your organization, select your own officers and adviser, adopt your own by-laws and rules, and select your representatives to meet with the Company officials whenever you desire."

would be discharged for "messing with the C.I.O." On June 1 Mann, a member of the C.I.O. who had openly protested against an "inside" union at one of the May 11 meetings (see note 6 *ante*) attended by Superintendent Bishop's son, Warren, was discharged for union activities.

On June 17 application cards for the Independent were distributed throughout the entire system of the Company and many were signed on Company property and time. Within three weeks after the adoption of the constitution of the Independent a majority of the employees filled out application cards. By July 13 the organization was complete and permanent committeemen had been elected. A majority of those committeemen had been present at the May 24 meetings. On July 19 the Independent notified the Company that it represented a majority of the employees and submitted a proposed contract. Negotiations were begun on July 30 and agreement was reached by midnight of the following day. The contract was formally executed on August 5, and provided, *inter alia*, for a closed shop, a check-off, and a wage increase. On August 20 the Company paid $3,784.50 to the Independent although it had not yet deducted that entire amount from the em- [fol. 5] ployees' wages. On November 4, the date upon which the closed shop provision became effective, the Company discharged two employees, Staunton and Elliott, because they refused to join the Independent. In March, 1938, it discharged another employee, Harrell, for his membership and activity in an outside union.

Upon the basis of these findings and the entire record in the case the Board concluded that the Company had committed unfair labor practices within the meaning of section 8(1), (2) and (3) of the Act. Its order directed the Company to cease and desist from its unfair labor practices and from giving effect to its contract with the Independent, to withdraw recognition from and disestablish that organization, to reinstate with back pay the four wrongfully discharged employees, to reimburse each of its employees who was a member of the Independent in the amount of the dues and assessments checked off his wages by the Company on behalf of the Independent, and to post appropriate notices.

The Company and the Independent filed separate petitions in the court below to review and set aside the Board's order. The Board answered and requested enforcement

of its order against the Company. The court below denied enforcement to any part of the Board's order, completely setting it aside.[8] We granted the petition for writs of certiorari because the case was thought to present important questions in the administration of the Act. 312 U. S. 677.

The Company is engaged in the business of generating and distributing electrical energy in eastern Virginia and north-eastern North Carolina. It also furnishes illuminating gas to customers in the vicinity of Norfolk, Virginia, and operates transportation services in Richmond, Norfolk, Portsmouth and Petersburg. It does not here renew the contention, correctly decided against it by the court below,[9] that the jurisdiction of the Board does not extend to its employees in the gas and transportation departments.

Domination of the Independent

The command of section 10(e) of the Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive" precludes an independent consideration [fol. 6] of the facts. Bearing this in mind we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act. But here the Board's conclusion that the Independent was a Company dominated union seems based heavily upon findings which are not free from ambiguity and doubt. We believe that the Board, and not this Court, should undertake the task of clarification.

The Board specifically found that the bulletin of April 26 and the speeches of May 24 "interfered with, restrained and coerced" the Company's employees in the exercise of their rights guaranteed by section 7 of the Act. The Company strongly urges that such a finding is repugnant to the First Amendment. Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose

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[8] Virginia Electric & Power Co. v. National Labor Relations Board, 115 F. 2d 414.

[9] *Ibid*, 415-416.

on this controversial issue. But certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. For "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 78.

If the Board's order here may fairly be said to be based on the totality of the Company's activities during the period in question, we may not consider the findings of the Board as to the coercive effect of the bulletin and the speeches in isolation from the findings as respects the other conduct of the Company. If the Board's ultimate conclusion is based upon a complex of activities, such as the anti-union background of the Company, the activities of Bishop, Edwards' warning to the employees that they would be discharged for "messing with the C. I. O.", the discharge of Mann, the [fol. 7] quick formation of the Independent, and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the Company said in conjunction with what it did. The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees the Board has a right to look at what the Company has said as well as what it has done.

But from the Board's decision we are far from clear that the Board here considered the whole complex of activities, of which the bulletin and the speeches are but parts, in reaching its ultimate conclusion with regard to the Independent. The Board regarded the bulletin on its face as showing a marked bias against national unions by implying that strikes and unrest are caused by the organizational campaigns of such bodies, by stressing the "happy rela-

tionship of mutual confidence and understanding" prevailing in the absence of organization since the defeat of the Amalgamated in 1922, and by emphasizing the negative "right" of the employees to refrain from exercising their rights guaranteed under the Act after paying "lip service" to those rights. Summing up its conclusions the Board said: "We interpret the bulletin as an appeal to the employees to bargain with the respondent directly, without the intervention of any 'outside' union. We find that by posting the bulletin the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

The Board was of the view that the speeches delivered in the meetings of May 24 provided the impetus for the formation of a system-wide organization, that they re-emphasized the Company's distaste for "outside" organizations by referring to the bulletin, and that, after quoting the provision of the Act forbidding employer domination of labor organizations, they suggested that the employees select their "own" officers, and adopt their "own" by-laws and rules. The Board's finding was: "We find that at the May 24 meetings the respondent urged its employees to organize and to do so independently of 'outside' assistance, and that it thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not ap- [fols. 8-10] pear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. The bulletin and the speeches set forth the right of the employees to do as they please without fear of retaliation by the Company. Perhaps the purport of these utterances may be altered by imponderable subtleties at work which it is not our function to appraise. Whether there are sufficient findings and evidence of interference, restraint, coercion, and domination without reference to the bulletin and the speeches, or whether the whole course of conduct evidenced in part by the utterances was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence.

Here we are not sufficiently certain from the findings that the Board based its conclusion with regard to the Independent upon the whole course of conduct revealed by this record. Rather it appears that the Board rested heavily upon findings with regard to the bulletin and the speeches the adequacy of which we regard as doubtful. We therefore remand the cause to the Circuit Court of Appeals with directions to remand it to the Board for a redetermination of the issues in the light of this opinion. We do not mean to intimate any views of our own as to whether the Independent was dominated or suggest to the Board what its conclusion should be when it reconsiders the case. Since the Board rested the remainder of its order in large part on its findings with respect to the domination of the Independent, we do not at this time reach the other parts of the Board's order, including the command that the checked-off dues and assessments should be refunded.

Reversed and remanded.

Mr. Justice Roberts and Mr. Justice Jackson took no part in the consideration or decision of this case.

[fol. 11] BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-914

In the Matter of

VIRGINIA ELECTRIC & POWER COMPANY

and

TRANSPORT WORKERS UNION OF AMERICA

Case No. C-915

VIRGINIA ELECTRIC & POWER COMPANY

and

AMALGAMATED ASSOCIATION OF STREET, ELECTRICAL RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, An Unincorporated Association

Case No. C-916

VIRGINIA ELECTRIC & POWER COMPANY

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

ORDER VACATING AND SETTING ASIDE DECISION AND ORDER, AND DIRECTING ISSUANCE OF PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW, AND PROPOSED ORDER

The Board, on February 27, 1940, having issued a Decision and Order in the above-entitled matter; and, thereafter, petitions to review and set aside the said Order having been filed in the United States Circuit Court of Appeals for the Fourth Circuit by Independent Organization of Employees of Virginia Electric & Power Company and respondent; the Board having answered and requested enforcement of its said Order; the matter having been presented to the said Circuit Court on briefs and oral argument; and, thereafter, on November 12, 1940, the said Circuit Court having entered its Decision and Decree vacating and setting aside the aforesaid Order of the Board and denying the Board's request for enforcement thereof; the said cause having been taken to the Supreme Court of the United States by virtue of a writ of certiorari; and the mandate of the said Supreme Court reversing the decree

of the said Circuit Court entered as aforesaid on November 12, 1940, and remanding the cause to the said Circuit Court with directions to remand to the National Labor Relations Board for a redetermination of the issues in the case in the light of the opinion entered by the said Supreme Court on December 22, 1941, having been filed in the said Circuit Court on January 28, 1942; and the said Circuit Court having entered its Order on March 9, 1942, remanding the cause to the National Labor Relations Board for a redetermination of the issues in the case in the light of the said opinion of the said Supreme Court of the United States; and the Board having duly considered the matter and being advised in the premises,

[fols. 12-94] It Is Hereby Ordered that the aforesaid Decision and Order of the National Labor Relations Board issued February 27, 1940, be, and it hereby is, vacated and set aside; and

It Is Further Ordered, pursuant to Article II, Section 37 (c) of National Labor Relations Board Rules and Regulations—Series 2, as amended, that Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order shall be issued; and

It Is Further Ordered, pursuant to Article II, Section 37, of the said Rules and Regulations, that the parties herein shall have the right, within thirty (30) days from the date of the said Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, to file exceptions and a brief in support thereof, and that the said parties shall have the right, within twenty (20) days from the date of the said Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, to request oral argument before the Board.

Dated, Washington, D. C., April 3, 1942.

By direction of the Board:

Beatrice M. Stern, Executive Secretary.

[fol. 95] [Stamp:] File in Informal File D

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-914

In the Matter of

VIRGINIA ELECTRIC & POWER COMPANY

and

TRANSPORT WORKERS UNION OF AMERICA

Case No. C-915

In the Matter of

VIRGINIA ELECTRIC & POWER COMPANY

and

AMALGAMATED ASSOCIATION OF STREET, ELECTRICAL RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, An Unincorporated Association

Case No. C-916

In the Matter of

VIRGINIA ELECTRIC & POWER COMPANY

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Mr. Gerhard P. Van Arkel, Mr. Reeves R. Hilton, and *Mr. Samuel M. Spencer,* for the Board.

Hunton, Williams, Anderson, Gay & Moore, by *Mr. T. Justin Moore* and *Mr. George D. Gibson,* of Richmond, Va., and *Venable, Miller, Pilcher, & Parsons,* by *Mr. Roman Miller,* of Norfolk, Va., for the respondent.

Mr. T. H. Latham, of Virginia Beach, Va., and *Mr. E. D. Bieretz,* of Washington, D. C., for the I. B. E. W.

Mr. Arthur E. Reyman, of New York City, *Mr. Floyd Kreisell,* of Columbus, Ohio, and *Zimring and Rabe,* by *Mr. O. David Zimring,* of Chicago, Ill., for the Amalgamated.

White, Temple, Hamilton & Wyche, by *Mr. W. Earle White,* of Petersburg, Va., and *Mr. Paul Hadlick* of Washington, D. C., for the I. O. E.

Mr. Owsley Vose, of counsel to the Board.

[fol. 96] STATEMENT OF THE CASE

On July 20, 1937, Transport Workers Union of America, herein called the T. W. U., filed with the Regional Director for the Fifth Region (Baltimore, Maryland), charges that Virginia Electric and Power Company, Richmond, Virginia,[1] herein called the respondent, had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On August 26, 1937, the T. W. U. filed amended charges that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the Act. On February 23, 1938, Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, herein called the Amalgamated, filed with the Regional Director charges that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1) and (2) and Section 2 (6) and (7) of the Act. On April 2, 1938, and on April 13, 1938, International Brotherhood of Electrical Workers, herein called the I. B. E. W., filed with the Regional Director charges and amended charges, respectively, that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the Act. On April 13, 1938, the National Labor Relations Board, herein called the Board, acting pursuant to National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered that the cases be consolidated for the purpose of hearing. On May 7, 1938, the Board, by the Regional Director, issued its complaint against the respondent alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon the respondent, the

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[1] Referred to as Virginia Electric & Power Company in the complaint.

I. B. E. W., the Amalgamated, the T. W. U.,[2] and The Independent Organization of Employees of Virginia Electric and Power Company, a labor organization, herein called the I. O. E.

Concerning the unfair labor practices the complaint alleged in substance that (1) since about May 1, 1937, the respondent dominated and interfered with the formation and administration of the I. O. E. and contributed support to it; (2) that the respondent on or about November 15, 1937, discouraged membership in the I. B. E. W. by terminating the employment of A. F. Staunton[3] and thereafter refusing to reinstate him because of his refusal to join the I. O. E. and because of his affiliation with the I. B. E. W.; on or about April 20, 1938, discouraged membership in the I. B. E. W. by terminating the employment of T. N. Harrell, Jr., and J. L. Judge,[4] and refusing to reinstate them because of their membership in the I. B. E. W. and because they had engaged in concerted activities with other employees; and that on or about May 30, 1937, the respondent discouraged membership in the T. W. U. by terminating the [fol. 97] employment of Everard M. Mann and refusing to reinstate him because of his membership in the T. W. U. and his concerted activities with other employees; (3) that the respondent on or about August 5, 1937, entered into an agreement with the I. O. E. providing, *inter alia*, that membership in said organization should be a condition of employment with the respondent and that said agreement was entered into with a labor organization which had been established, maintained, and assisted by unfair labor practices and which was not the representative of the respondent's employees as provided in Section 9 (a) of the Act; and (4) that the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act by making statements hostile to, and tending to discourage membership of its employeess in, the

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[2] Copies of the complaint and notice of hearing which were sent to Mont Crum, the person filing the amended charges for the T. W. U., were returned to the Board. The T. W. U. did not appear at the hearing nor participate in the proceedings.

[3] Referred to as Alfred Staunton in the record.

[4] Referred to as Johnny L. Judge in the record.

T. W. U., the I. B. E. W., and the Amalgamated, by maintaining surveillance over the efforts of its employees to form a labor organization, and by employing the service of detective agencies to render reports on the organizational activities of its employees.

On May 12, 1938, the I. O. E. filed a motion for intervention stating that it had entered into an agreement with the respondent on August 5, 1937, by which the respondent recognized it as the exclusive bargaining representative of all the respondent's employees with a few exceptions and denying that the respondent had dominated, supported, or interfered with it. On May 14, 1938, the respondent filed its answer denying that it was engaged in interstate commerce and denying that it had engaged in any of the unfair labor practices alleged in the complaint.

Pursuant to the notice, a hearing was held in Norfolk, Virginia, from May 19 to June 18, 1938, before James L. Fort, the Trial Examiner duly designated by the Board. The Board, the respondent, the I. B. E. W., the Amalgamated, and the I. O. E. were represented by counsel and participated in the hearing. The I. O. E. was permitted to intervene with respect to the alleged unfair labor practices within the meaning of Section 8 (2) of the Act. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties, subject, in the case of the I. O. E., to the limitation noted above. On May 21, 1938, the Amalgamated filed with the Regional Director amended charges alleging that the respondent had further engaged in unfair labor practices, within the meaning of Section 8 (1) and (3) of the Act by discouraging membership in the Amalgamated through its discharges of Joseph Bolton on or about January 15, 1938, and Robert E. Elliott, Jr., on or about November 3, 1937, and its refusals to reinstate them because of their membership in the Amalgamated. On motion of counsel for the Board the complaint was amended at the hearing to incorporate these allegations.[5] The Trial Examiner granted the motion of counsel for the Board made at the close of its case to conform the pleadings to the proof. During the course of the hearing the Trial Examiner made

[5] On June 16, 1938, the respondent filed an amended answer denying that it had engaged in unfair labor practices by its discharges of Bolton and Elliott.

rulings on other motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On September 13, 1938, the Trial Examiner filed his Intermediate Report, copies of which were served on all parties, in which he found that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the Act, and recommended that the respondent cease and desist therefrom and take certain affirmative action to remedy the situation resulting from the unfair labor practices. He further recommended that the allegations of the complaint relating to the discharge of Joseph Bolton be dismissed.

[fol. 98] On September 23, 1938, the I. O. E. filed exceptions to the Intermediate Report and on September 26, 1938, the respondent filed exceptions to the Intermediate Report and a motion to dismiss the complaint. The respondent and the I. O. E. filed briefs in support of their exceptions to the Intermediate Report.

Pursuant to notice duly served on all the parties, a hearing was held before the Board in Washington, D. C., on April 11, 1938, for the purpose of oral argument. The respondent, the Amalgamated, the I. B. E. W., and the I. O. E. were represented by counsel and participated in the argument.

The Board, on February 27, 1940, after consideration of the exceptions to the Intermediate Report and the briefs submitted in support of said exceptions, issued its decision containing its findings of fact, conclusions of law, and order. In brief, the Board found that the respondent had dominated and interfered with the formation and administration of the I. O. E. and had contributed support to it in violation of Section 8 (2) of the Act; had discharged four employees [6] in violation of Section 8 (3) of the Act; and had by these and other acts interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act.

Thereafter, the respondent and the I. O. E. filed with the United States Circuit Court of Appeals for the Fourth

[6] Mann, Elliott, Staunton, and Harrell.

Circuit their separate petitions to review and set aside the Board's order, to which the Board filed answers requesting enforcement of its order. The Circuit Court, on November 12, 1940, after consideration of briefs and arguments of counsel for the respective parties handed down its decision sustaining the Board's jurisdiction but reversing and setting aside the Board's order in its entirety.[7] In March 1941, the Supreme Court of the United States granted the Board writs of certiorari to review the decision of the Circuit Court.[8] On December 22, 1941, the Supreme Court having considered the briefs and having heard arguments of counsel for the respective parties, handed down its decision remanding the cause to the Circuit Court of Appeals with directions to the Circuit Court to remand the cause to the Board for a redetermination of the issues in the light of the Supreme Court's opinion.[9] On March 9, 1942, the Court of Appeals formally remanded the case to the Board pursuant to the mandate of the Supreme Court. On April 3, 1942, the Board entered an order vacating and setting aside its Decision and Order dated February 27, 1940, and directing that Proposed Findings of Fact, Proposed Conclusions of Law, and a Proposed Order be issued.

On July 6, 1942, the Board issued said Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, copies of which were served on all parties, finding that the respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (2), and (3) [fol. 99] and Section 2 (6) and (7) of the Act, and directing that the respondent cease and desist from its unfair labor

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[7] 115 F. (2d) 414.

[8] 312 U. S. 677.

[9] The Supreme Court, taking the view that the Board's ultimate conclusion that the respondent had violated Section 8 (1) and (2) of the Act rested largely upon a bulletin posted on April 26, 1937, and speeches delivered to representatives of the employees on May 24, 1937, the adequacy of which standing alone the Court regarded as doubtful, held that whether the respondent's "whole course of conduct," of which the bulletin and the speeches were a part, warranted findings of interference and domination was "for the Board to determine upon the evidence." (313 U. S. 469, 479).

practices, withdraw all recognition from and disestablish the I. O. E., reimburse employees in the amount of dues deducted from their wages on behalf of the I. O. E., and offer reinstatement with back pay to Everard M. Mann, A. F. Staunton, and T. N. Harrell, Jr. Exceptions to the Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order and briefs in support thereof were filed by the respondent and the I. O. E.

Pursuant to notice and at the request of the respondent and the I. O. E., a hearing was held before the Board at Washington, D. C., on August 25, 1942, for the purpose of oral argument. The respondent, the I. O. E. and the I. B. E. W. were represented by counsel and participated in the argument. The Board has considered the exceptions to the Proposed Findings, Proposed Conclusions of Law, and Proposed Order and the briefs in support thereof and, insofar as the exceptions are inconsistent with the findings, conclusions, and order set forth below, finds them to be without merit.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The business of the respondent

The respondent, Virginia Electric and Power Company, was incorporated in Virginia on June 29, 1909, as the Virginia Railway and Power Company. On October 27, 1925, it adopted its present name. The respondent is engaged, among other things, in the business of generating, distributing, and selling electrical energy in eastern Virginia and northeastern North Carolina. The area served comprises approximately 10,000 square miles, has an estimated population of 767,000 and includes the cities of Richmond, Norfolk, Portsmouth, Petersburg, Hopewell, Suffolk, and South Norfolk, Virginia, and the cities of Roanoke Rapids, Weldon, Williamston, and Plymouth, North Carolina. In addition, the respondent furnishes for resale electrical energy to 9 municipal systems serving a population of 26,000. The respondent is also engaged in the business of supplying illuminating gas to consumers situated in Norfolk, South Norfolk, and Norfolk County, Virginia. The respondent likewise operates street railway and bus lines in Richmond and Norfolk, bus lines in Portsmouth and Petersburg, and

interurban bus lines between Richmond and Petersburg. Its principal office is located in Richmond, Virginia, and it maintains 14 branch offices in various cities and towns in Virginia and North Carolina. As of December 31, 1937, respondent had a total of 3,437 employees.[10]

The respondent maintains 4 hydro-electric generating plants and 3 steam generating plants with a total capacity of approximately 173,000 kilowatt hours, 5 of which are in Virginia and 2 in North Carolina, and operates approximately 250 substations. It has transmission line interconnections with the Virginia Public Service Company at Occoquan, Virginia, and at Roanoke Rapids, North Carolina, and 2 transmission line interconnections with the Carolina Power and Light Company in North Carolina. During the year 1937 the respondent purchased from the abovenamed companies 7.1 per cent of its own total electric output. During 1937 the electric energy generated and purchased by the respondent aggregated 664,859,694 kilowatt hours, of which the respondent transmitted about 52,000,000 kilowatt hours from Virginia to North Carolina and approximately 39,000,000 kilowatt hours from North Carolina [fol. 100] to Virginia. Among the consumers of the power generated and purchased by the respondent are railroads, telegraph companies, telephone companies, newspapers, radio stations, shipyards, airports, and agencies furnishing aid to navigation.

In addition to operating a street railway and bus system in Richmond and Norfolk, bus service in Portsmouth and Petersburg, and interurban bus service between Richmond and Petersburg, the respondent maintains in Virginia shops, garages, and car barns for the storing, overhauling, and repairing of its street cars and motor busses. The transportation system of the respondent as of December 31, 1937, included approximately 133 miles of equivalent single track, 251 passenger street cars, and 294 busses. In 1937, the respondent's transportation department used 31,253,514 kilowatt hours of power generated by the electrical department.

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[10] In its original brief to the Board the respondent asserted that on April 30, 1938, it had 1,169 employees in the electric department, 112 in the gas department, and 1,259 in the transportation department.

As of December 31, 1937, the respondent maintained in Norfolk, Virginia, 2 gas generating units of approximately equal size with a total rated generator capacity of 8½ million cubic feet per day, a holder capacity of 5,273,000 cubic feet, and 332 miles of high and low pressure gas mains. During 1937 approximately 1,253,000 kilowatt hours of power generated by the electrical department were used in the manufacture of gas.

For the operation of its electrical, transportation, and gas systems in 1937, the respondent purchased considerable amounts of materials coming from points outside the Commonwealth of Virginia. For the generation of electrical energy 295,207 tons of coal were used, more than 50 per cent of which were purchased in West Virginia. About 2,587,000 gallons of gasoline, consumed by the busses of the respondent, were purchased in the Commonwealth of Virginia but originated in sources outside the Commonwealth. The busses, street cars, and tires used by the respondent were also bought in States other than Virginia. To produce the gas distributed by it, the respondent consumed 10,821 tons of coal, most of which were purchased in West Virginia; 3,800 tons of coke, which were shipped to the respondent through West Virginia although purchased in Virginia; and 3,290,000 gallons of oil purchased in Virginia but originating in States other than Virginia.

The respondent concedes that the employees engaged in the transmission process of the electrical department are engaged in interstate commerce, but argues that all its other employees are not subject to the Board's jurisdiction. We find, however, not only (1) that the respondent maintains facilities in North Carolina and in Virginia for the generation and distribution of electrical energy; (2) that large amounts of electrical energy generated by the respondent are transmitted across State lines; (3) that the respondent purchases electrical energy which is transmitted to it across State lines; (4) and that instrumentalities of interstate commerce, such as railroads, telephone, and telegraph companies, use electrical energy supplied by the respondent; but also (5) that the respondent receives large quantities of coal, coke, and other commodities in interstate commerce for its transportation and gas departments; and (6) that the respondent is an integrated enterprise with a centralized management and general office force and with

some sharing of common facilities by the transportation and electrical departments. We conclude that a cessation of the respondent's business resulting from a labor dispute between the respondent and its employees (a) would affect the flow of large quantities of electrical energy and other commodities received and distributed by the respondent in interstate commerce and (b) would tend to burden and obstruct the operation of various instrumentalities of interstate transportation and communication.

[fol. 101] II. The organizations involved

Transport Workers Union of America is a labor organization affiliated with the Committee for Industrial Organization,[11] admitting to its membership employees engaged in the transportation operations of the respondent.

Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America is a labor organization affiliated with the American Federation of Labor. It admits to membership all the employees engaged in the respondent's electrical railway and bus system, excluding supervisory, office, and clerical employees.

International Brotherhood of Electrical Workers is a labor organization affiliated with the American Federation of Labor. It admits to membership all types of electrical workers of the respondent.

The Independent Organization of Employees of Virginia Electric and Power Company, an unaffiliated labor organization, admits to membership all employees of the respondent excluding supervisory, part-time, and confidential employees.

III. The unfair labor practices

A. *Background*

The respondent in the past has been opposed to the organization of its employees; from 1922, when the Norfolk, Richmond, Portsmouth, and Petersburg street car operators unsuccessfully went out on strike in protest against the respondent's refusal to renew a preexisting contract until 1937, the respondent's employees remained totally unorganized. The respondent's attitude towards the organiza-

[11] Now the Congress of Industrial Organizations.

tion of its employees was epitomized in the statement of Jack G. Holtzclaw, the respondent's president, made in the course of a message to employees delivered shortly after the enactment of the National Industrial Recovery Act in 1933, that "It would be very foolish and entirely inconsistent with the past policy of our Company's operations if I did not state definitely to our employees that it is our belief that the organization of our employees for any purpose in this Company for their protection or collective bargaining or whatnot is entirely unnecessary." Although Holtzclaw quoted from Donald Richberg and Hugh Johnson on the subject of employees' rights to organize under the N. I. R. A., the message as a whole makes it clear that the respondent strongly disapproved of the employees exercising those rights, and we so find.

B. *The I. O. E.; interference, restraint, and coercion*

At the time of the passage of the Act in July 1935 the respondent was using the full-time services of one Walters, an undercover operative furnished by the Railway Audit and Inspection Company;[12] the respondent continued to use his service until Walters' death in May 1937. One of the purposes for which Walters was employed was to report on labor activities among the employees at Norfolk. Walters reported to E. L. Bishop, the superintendent of the Norfolk transportation department. Following the typical technique of the labor spy, Walters posed as an energetic advocate of unionism, on one occasion openly supporting [fol. 102] a strike at a Norfolk garment factory, addressing the strikers over a loudspeaker system. He was accepted by union officials and members alike as a sympathizer with organized labor when he attended meetings of the Norfolk Central Labor Union.

Superintendent Bishop, to whom Walters reported, himself sought to uncover organizing activities among the employees. In 1936, after being informed that a group of his employees were considering organizing, he admittedly

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[12] On the industrial espionage and strikebreaking activities of the Railway Audit and Inspection Company see Sen. Rep. No. 46, Part 3, 75th Cong., 2nd Sess. pp. 18, 88; Sen. Rep. No. 6, 76th Cong., 1st Sess., pp. 82, 183-195.

summoned several employees to his office and questioned them about it.

In March 1937 an A. F. of L. organizer met the chief engineer of the Reeves Avenue, Norfolk, power plant and advised him that the A. F. of L. intended to organize the men.[13] An A. F. of L. organizer began distributing circulars among the Richmond employees in March or April 1937. On April 12, 1937, the Supreme Court of the United States upheld the constitutionality of the Act.[14] On April 26, 1937, the respondent posted the following bulletin throughout its operations, purporting to advise the employees as to their rights under the Act:

To the Employees of the Company:

As a result of recent national labor organization activities and the interpretation of the Wagner Labor Act by the Supreme Court, employees of companies such as ours may be approached in the near future by representatives of one or more such labor organizations to solicit their membership. Such campaigns are now being pressed in various industries and in different parts of the country and strikes and unrest have developed in many localities. For the last fifteen years this Company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other, and during this period there has not been any labor organization among our employees in any department, so far as the management is aware. Under these circumstances, we feel that our employees are entitled to know certain facts and have a statement as to the Company's attitude with reference to this matter.

The Company recognizes the right of every employee to join any union that he may wish to join, and such member-

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[13] Upon being advised of this a few hours later President Holtzclaw immediately issued orders that the organizer be instructed that he could do no organizing during working hours or on company property.

[14] *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, rev'g 83 F. (2d) 998 (C. C. A. 5), and aff'g *Matter of Jones & Laughlin Steel Corporation* and *Amalgamated Association of Iron, Steel & Tin Workers of North America, Beaver Valley Lodge No. 200*, 1 N. L. R. B. 503, and companion cases.

ship will not affect his position with the Company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary. Certainly, there is no law which requires or is intended to compel you to pay dues to, or to join any organization.

This Company has always dealt with its employees in full recognition of the right of every individual employee, or group of employees, to deal directly with the Company with respect to matters affecting their interests. If any of you, individually or as a group, at any time, have any matter which you wish to discuss with us, any officer or department [fol. 103] head will be glad, as they always have been, to meet with you and discuss them frankly and fully. It is our earnest desire to straighten out in a friendly manner, as we have done in the past, whatever questions you may have in mind. It is reasonable to believe that our interests are mutual and can best be promoted through confidence and cooperation.

(Signed) J. G. Holtzclaw, President.

Shortly after the respondent posted this bulletin, after observing the transportation employees engaged in group discussions, Superintendent Bishop, as in 1936 when he suspected the employees of attempting to organize, sought out one of them Anthony R. Ruett, and queried him as to what the men were discussing. Ruett replied, so he testified, that the men were talking about desiring wage increases, about other firms giving increases, and their right under the Act to organize unions and ask for wage increases. Bishop inquired, according to Ruett, whether the men were talking about joining the C. I. O. or the A. F. of L. and warned: "You don't want no C. I. O. or any other organization to come in here and tell you what to do, because the company is not going to recognize them and, in fact, they have money put away for the purpose of fighting the unions." Bishop added that "unions were no good and that they were nothing but trouble-makers" and suggested, Ruett testified, that "the best thing for the men to do was to get amongst themselves and form their own organization and present their claims." Bishop admitted having suggested to Ruett that he call a meeting for the purpose of selecting a committee to present their demands to the respondent,

but denied having suggested that they form an organization. Bishop also denied at any time having asserted that the respondent had funds with which to fight unions. The remainder of Ruett's testimony referred to above was undenied. We are not convinced by Bishop's partial denial and find that he made the statements attributed to him by Ruett.

Pursuant to Bishop's suggestion, Ruett scheduled two meetings of the car and bus operators on May 11, 1937, one in the morning and one in the afternoon. Robert E. Elliott, Jr. a car operator, who, prior to these meetings had drafted a petition requesting improved wages, hours, and working conditions, was selected to act as chairman of the meetings. Bishop spoke briefly to the employees at the morning meeting and left. Elliott presented his petition to the employees at both meetings and virtually all of them signed it. At the morning meeting, which was attended by Superintendent Bishop's son, not an employee of the respondent, and Dispatcher Fields, Everard M. Mann, a car operator, spoke out vigorously against the formation of an independent union and urged affiliation with a national union, preferably the C. I. O. A number of the men agreed with him, and one of them immediately after the meeting sought out the C. I. O. organizer, who was currently carrying on an organizing campaign in the Norfolk area, and signed a C. I. O. card.

After a large majority of the transportation employees at Norfolk had signed the petition, it was presented to Superintendent Bishop by a committee of six elected at the first meeting. About this same time several other groups of employees presented to their supervisors petitions for increased wages or better hours or working conditions, President Holtzclaw concluded that to deal with these and other similar groups would lead to "chaotic" conditions, and after consulting with the supervisory staff it was decided that the respondent's position in this matter should be communicated to the employees. The respondent decided that it would have the employees in every department select representatives for the purpose of attending meetings at which high officials of the respondent would deliver a message, which the representatives were to carry back to their constituents. Pursuant to this decision, supervisory [fol. 104] officials throughout the respondent's system con-

voked meetings of their subordinates on company time and property and instructed them to select representatives to hear the respondent's message. The supervisory officials carefully absented themselves from the meetings, pursuant to instructions from President Holtzclaw. The employees complied with these instructions and the representatives selected attended meetings in the respondent's office buildings at Richmond and Norfolk on May 24. At Richmond, President Holtzclaw, and at Norfolk, R. J. Throckmorton, vice president in charge of the respondent's Norfolk operations, delivered the following prepared address:

A substantial number of its employees representing various departments and various occupations have approached the Company with the request that the Company consider with them the matter of their working conditions and wages. In other words, they have requested collective bargaining The Company's position with respect to this was recently stated in a posted bulletin.

In a Company such as ours, if an individual operator, for example, should ask for himself better working conditions or wages, this Company could not comply with his request without also making the same concessions to other similar operators. In such a case the operator who appealed individually would, as a practical matter, be bargaining collectively for all of his group, which is not the logical procedure.

This Company is willing to consider the requests mentioned above but feels that, in fairness to all of its employees and to itself, it should at the same time consider other groups who have not yet come to it. If the approaching negotiations are to be intelligent and fair to all properly concerned, they should be conducted in an orderly way, and all interested groups should be represented in these discussions by representatives of their own choosing, as provided in the Wagner National Labor Relations Act, which provides as follows:

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

The Wagner Act applies only to employees whose work is in or directly affects interstate commerce and to companies

engaged in interstate commerce. Counsel for this Company advise us that in their opinion the provisions of the Act do not apply to local transportation employees, to gas employees in Norfolk, or to certain strictly local employees of the light and power department. In spite of this, the Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make.

The petitions and representations already received indicate a desire on the part of these employees at least to do their own bargaining, and we are taking this means of letting you know our willingness to proceed with such bargaining in an orderly manner. In order to progress, it would seem that the first step necessary to be taken by you is the formation of a bargaining agency and the selection of au- [fol. 105] thorized representatives to conduct this bargaining in such an orderly manner.

The Wagner Labor Act prohibits a company from "dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it."

In view of your requests to bargain directly with the Company and, in view of your right to self-organization as provided in the law, it will facilitate negotiations if you will proceed to set up your organization, select your own officers and adviser, adopt your own by-laws and rules, and select your representatives to meet with the company officials whenever you desire.

Holtzclaw added, at the conclusion of the quoted speech, that any wage increase granted by the respondent would become effective as of June 1, 1937; Throckmorton did not. As to all other material incidents the two meetings were substantially identical. Employees asking whether they had to join a labor organization and what kind of organization they should form were told that they need join none and were refused advice as to the type of organization they should adopt. As the respondent's officials left these meetings, in accordance with arrangements made beforehand, they announced that the representatives might remain for further discussion of the matters broached. At both meet-

ings, a substantial number of the representatives remained, and discussed the benefits to be derived from organizing. The Richmond representatives, after electing a temporary chairman "to push this thing into an organization," decided to inform their constituents as to what had occurred at the meeting and to report back their reactions at a meeting of the representatives to be held on June 1. The Norfolk representatives decided to ascertain the reaction of their constituents to the message and to bring written authorizations from them to a meeting on June 1.

Pursuant to these decisions, during the following week meetings of employees were held in almost every department. The respondent's supervisors actively cooperated. Superintendent of Distribution Crafton arranged to have the Norfolk linemen brought in without working overtime so that they could hear their representative report to his department. Superintendent Davis, of the Reeves Avenue plant in Norfolk, gave permission for the use of the company auditorium on May 27. Superintendent of Installation Walke in Richmond permitted the use of the Service Building for meetings of the line department and the engineering group during working hours, and held the linemen in the office so that they could attend. At each meeting, after the respondent's message had been reported to the men, they immediately voted to form an unaffiliated union and elected representatives for that purpose, the same representatives for the most part that they had previously selected at the respondent's request to hear the May 24 message.

The June 1 meetings were held as scheduled, the representatives from the Richmond area meeting in the auditorium of the respondent's Service Building and the representatives from the Norfolk area meeting in the respondent's general office building at Norfolk. The Richmond representatives constituted themselves a steering committee to form an organization without "outside aid or interference" and designated a committee to consult with a Norfolk committee on selection of a lawyer to draw up a constitution and plan of organization. On June 3 committees from both Richmond and Norfolk met at the respondent's office building at Petersburg and appointed representatives to employ an attorney to draft a constitution and by-laws for a system-wide organization. Several days later, W.

Earle White of Petersburg was retained for this purpose. On June 7 the Norfolk representatives again met in the [fol. 106] respondent's general office building at Norfolk, and, like the Richmond representatives constituted themselves a steering committee for the formation of an unaffiliated system-wide organization.

On June 9 the Richmond steering committee met in the respondent's service building at Richmond [15] and discussed the proposed constitution and by-laws prepared by Attorney White. The Norfolk steering committee met on June 11 in the respondent's general office building and again on June 14 in the auditorium of the respondent's Reeves Avenue plant to consider the proposed constitution and by-laws.

On June 14 the Richmond steering committee requested the respondent to furnish by noon of the next day a list by departments and subdivisions thereof of the names of all the "worker personnel" of the respondent below the rank of foreman or supervisor, or in the alternative, to furnish a detailed statement as to the numbers of non-supervisory employees in all the respondent's departments and subdivisions thereof. The respondent, the same day it received the request, furnished the latter statement and promised to submit the list of names requested as soon as it could be prepared.

On June 15 the Norfolk and Richmond representatives met in the American Legion Hall at Richmond and formally adopted the constitution and by-laws of the I. O. E. The constitution provides for 4 divisional committees at Norfolk: the transportation, electric, gas, and accounting, sales, and general office committees; and 3 divisional committees at Richmond: the transportation, electric, and accounting, sales, and general office committees. In the Norfolk division, employees in 14 voting sections, which correspond roughly to the various departments operated by respondent in this division, elect representatives to the 4 divisional committees. In the Richmond division employees in 13 voting sections elect representatives to the 3 divisional committees there. The representatives of the 4 divisional committees at Norfolk constitute the Norfolk interdepartmental committee and the representatives of the 3 divisional

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[15] This is stated in the brief submitted to the Board by counsel for the I. O. E.

committees at Richmond constitute the Richmond interdepartmental committee. The interdepartmental committees elect from their own number representatives to the general committee, the supreme body of the I. O. E. The constitution and by-laws make no provision for the holding of meetings of members of the various voting sections.[16]

On June 17 application cards for membership in the I. O. E., were distributed throughout the entire system; a number of them were signed on the respondent's premises during working hours. Solicitation of memberships in outside organizations also occurred on the respondent's premises during this period. Within 2 weeks a majority of the respondent's employees applied for membership in the I. O. E.

On June 22 a general meeting of the Norfolk employees was convened for the purpose of explaining the constitution and by-laws of the I. O. E. Thereafter, elections were held off the respondent's premises: on July 2, to nominate representatives of the various voting sections of the I. O. E., and on July 12, to elect the representatives. On July 13 the Norfolk steering committee announced the results of the elections and then dissolved. The voting section representatives then voted for officers to the interdepartmental committees and a delegate-at-large to the general committee. A meeting was held in Richmond on July 16 at which the Richmond steering committee was dissolved and the officers [fol. 107] of the interdepartmental committee and representatives to the general committee were elected.

On July 17 and 18, 1937, the various interdepartmental representatives and general committeemen held a convention at Ocean View, Virginia. After discussing the desires of their constituents, the various representatives, with the assistance of Attorney White, drafted a proposed contract to be submitted to the respondent, embodying demands for a closed shop,[17] check-off of I. O. E. dues, and substantial wage increases. On July 19 the I. O. E. notified the respond-

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[16] Subsequently the by-laws were amended by the General Committee to provide for annual meetings of the members of the various voting sections.

[17] That is, the I. O. E. asked that all present and future employees be required to join the organization after a specified period.

ent that it represented more than 50 per cent of the respondent's employees, submitted the proposed contract, and requested that a date be set for its discussion. On July 21, the respondent set July 30 as the date for the negotiations and requested that a certificate as to the organization's membership and right to represent the employees be furnished prior to the conference. This was done.

The bargaining conference opened on the morning of July 30 with a discussion of the general provisions, that is, the recognition, the closed-shop, the check-off, and the grievance procedure provisions. The recognition clause was readily agreed to. The respondent in the recognition clause agreed to permit the I. O. E. to erect bulletin boards on company property. The respondent offered no objection to the check-off provision, providing for the deduction of I. O. E. dues from members' wages upon written orders signed by the members, but added the proviso that such orders might be revoked at any time.[18] The respondent at once agreed to the grievance procedure provisions with minor variations. The closed-shop provision was discussed for 2 hours at the opening session; further discussion was postponed while the representatives of various departments split up and discussed with departmental officials of the respondent matters pertaining to their departments. Discussion of the closed-shop issue was not resumed until the final session of the conference when, after 2 hours further discussion, the closed-shop provision was agreed upon[19] and wage increases, costing the respondent $600,000 annually, were granted. The wage increase was made retroactive to June 1, 1937, as President Holtzclaw, on May

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[18] In view of the closed-shop provision to which the respondent agreed on the following day and the provision in the I. O. E.'s constitution and bylaws requiring all members to authorize the deduction of dues, the proviso added by the respondent is totally without effect.

[19] Under the closed-shop provision all present employees were given 90 days in which to join the I. O. E.; future employees were required to join within 90 days from the date of their hiring. At the instance of the respondent the proviso was added that nothing in the contract should prevent employees from joining or remaining members of any other labor organization.

24, had promised. After ratification by the interdepartmental committees, the contract was formally executed on August 5, 1937.

On August 20, 1937, the respondent paid the I. O. E. $3,784.50 as dues, pursuant to the check-off provision in the contract, although it had not yet deducted that entire amount from the wages of the employees. On October 28 the respondent posted a notice throughout its entire system, stating that the 90-day period provided for in the contract would expire on November 4, 1937, and that it was necessary for all its employees to join the I. O. E. by that date. On November 4 the respondent discharged two employees who refused to join the I. O. E.[20]

[fol. 108] The respondent's attitude towards nationally affiliated organizations during the crucial organizing period of the I. O. E. contrasts sharply with its highly cooperative attitude towards the I. O. E. Everard M. Mann, who had openly espoused affiliation with the C. I. O. at the meeting of the Norfolk transportation employees held on May 11 at the behest of Superintendent Bishop, was summarily and unlawfully discharged on the eve of the crucial June 1 meetings at Norfolk and Richmond.[21] Three employees testified that William Edwards, a supervisor in the transportation department under Superintendent Bishop, stood across the street from places where C. I. O. meetings were being held observing those who entered. Jesse Smith, an employee in the Norfolk transportation division, testified that Edwards warned him that the employees would keep "messing with the C. I. O." until they lost their jobs. Raymond Hopkins, another Norfolk transportation employee, testified that Edwards came to him the day after he signed a C. I. O. card and warned him that he "wouldn't last long" if he did not "drop" the C. I. O. immediately. Hopkins and Robert E. Elliott both testified that early in June, Edwards, while in uniform, accosted them in a restaurant near the car barn and profanely accused them of "causing all of the trouble around here." When Hopkins and Elliott left the restaurant in an effort to avoid an argument, Edwards followed them into a restaurant across the street and con-

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[20] See Section D, *infra*.

[21] See Section D, *infra*.

tinued to harass them, asserting, "They are trying to put me and Mr. Bishop in the penitentiary but I am going to show them I am going to put them in the penitentiary." This testimony is fully confirmed by the testimony of a Norfolk city policeman who witnessed the incident. Edwards denied engaging in the conduct attributed to him by these employees, but we do not credit the denial, and accordingly find that Edwards engaged in surveillance and the other intimidatory conduct attributed to him.

Superintendent Bishop, too, engaged in various acts of unlawful interference. Preliminarily, it should be noted that the group of Norfolk transportation employees which had submitted to him the petition requesting a substantial increase in wages and certain improvements in hours and working conditions, held aloof from the movement to form an independent company-wide organization. Various members of this group testified to conversations with Superintendent Bishop after the movement to organize an unaffiliated system-wide organization had started. Three employees testified to the effect that Bishop urged that the group should "have something to do with the system-wide organization," that they should select their own lawyer to assist them in drafting a constitution and bylaws, and that they could do much better with such an organization than with an outside organization. Bishop denied having made any such suggestion to two of the three employees, but upon the entire record we find that Bishop made the suggestions and statements attributed to him by the three employees.

Robert E. Elliott, the leader of this group which was composed of a majority of the Norfolk transportation employees, went to Richmond on June 14 and sought to arrange a bargaining conference with President Holtzclaw. Holtzclaw refused to agree to such a conference, admittedly asserting that to deal with so small a group as the Norfolk transportation employees "would mean a chaotic condition in negotiations." Elliott testified that on his return from Richmond on June 15 Superintendent Bishop sought him out at his home and informed him that:

> 150 men have come to me in the last two or three days and told me that they want to hook up with this system-wide organization. • • •

Why don't you forget this transportation organization that is trying to be formed around here, and see what the men want to do. • • •
[fol. 109] Now, look, if you will swing the men into the company union or into this system-wide union, I am going to have a good job open in a few months. • • • If you will play ball with the company, I will see that you get that job.

Elliott further testified that several days later Bishop summoned him to his [Bishop's] home and talked with him at length concerning the respondent's activities. During the course of the conversation Bishop asserted, according to Elliott, that the "Company had an enormous surplus of money • • • and that they could fight organizations, and that they would fight organizations • • • This company usually gets what it wants." Elliott's testimony continued that after further discussion Bishop handed him a booklet describing the company-union plan in effect at the Colorado Fuel and Iron Company with the suggestion that he study it thoroughly, and told him that if an independent organization was formed he would see that Elliott was made chairman of it.

While denying most of the foregoing testimony Bishop did not make any effort to explain what he had said on the various occasions on which he admittedly had conversations with Elliott; nor did he deny giving Elliott the booklet on the company-union plan in effect at the Colorado Fuel and Iron Company. We find Elliott's complete and detailed statements as to how Bishop sought him out and as to what Bishop said to him on each of these occasions more persuasive than Bishop's bare denials and find that Bishop made the statements and engaged in the conduct attributed to him by Elliott.

C. *Conclusions with respect to the respondent's interference, restraint, and coercion and domination of the I. O. E.*

Upon the foregoing facts, we are of the opinion and find that the respondent has engaged in a course of conduct calculated to restrain and discourage its employees from self-organization in nationally affiliated unions and to divert and canalize their organizational efforts to the establish-

ment of a company-wide unaffiliated labor organization; that in its totality, the respondent's conduct has been coercive of its employees in the exercise of their right to self-organization, with the result that when they formed the I. O. E. they were not as free as the statute requires; that the I. O. E. is the fruit of the respondent's illegal interference with, and restraint and coercion of its employees; and that the respondent has dominated the formation and administration of the I. O. E., and has contributed financial and other support to it.[22]

As early as 1933, in a message purporting to enlighten the employees as to their right to organize, the respondent indicated its strong disapproval of their exercise of that right. The passage of the Act, far from modifying the respondent's hostility toward independent employees' self-organization, saw the continued employment by the respondent of an undercover operative to report on self-organiza-[fol. 110] tional efforts,[23] and attempts on the part of Superintendent Bishop, himself to discover and thwart incipient union movements by questioning employees concerning such matters.[24]

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[22] The respondent contends that the bulletin of April 26, 1937, and the messages of May 24, 1937, are unobjectionable expressions of opinion concerning matters of current interest to the employees, free from any element of interference, restraint, or coercion. As more fully discussed below, however, these messages may not be viewed separately and apart from the setting in which they occurred and without reference to their impact upon the employees because of the attendant circumstances. Taking into consideration these factors, these messages, whatever their significance when viewed standing alone, plainly cannot be regarded as mere expressions of the employer's opinion.

[23] See *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 598, enf'g *Matter of Link Belt Company* and *Steel Workers Organizing Committee*, 12 N. L. R. B. 854; *N. L. R. B.* v. *Fruehauf Trailer Co.*, 301 U. S. 49, 54, enf'g *Matter of Fruehauf Trailer Company* and *United Automobile Workers Federal Labor Union No.* 19375, 1 N. L. R. B. 68.

[24] See *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 518, enf'g *Matter of H. J. Heinz Company* and *Canning and Pickle Workers, Local Union No.* 325, 10 N. L. R. B. 963.

When employees' self-organization was given impetus by the decisions establishing the constitutionality of the Act, President Holtzclaw once more resorted to the device of "advising" the employees as to their "rights", in order to condition them against the free exercise thereof. In the posted bulletin of April 26, Holtzclaw paid lip-service to the right of self-organization, at the same time stressing the negative aspects of the Act, pointing out that "it is not at all necessary * * * to join any labor organization" and that "there is no law which requires * * * you to pay dues to or to join any organization," inveighing against the choice of a national union by contrasting the "strikes and unrest" which were said to accompany the organizing drives of national unions with the "happy relationship" which was alleged to have attended the 15 years' absence of national unions from among the employees, and concluding with an appeal to the employees "individually or as a group" "to deal directly with the Company" as "in the past,"[25] rather than through representatives, as contemplated by the Act.

The employees followed the course charted for them by the respondent, several groups submitting petitions requesting changes in existing wages, hours, and working conditions. The respondent abruptly decided that it had set the employees upon the wrong course, that dealing with these groups which had submitted petitions in response to its suggestions, led to "chaotic conditions." Accordingly, the respondent plotted a new course for the employees and took every precaution to see that the employees did not waver therefrom. The objective now was company-wide bargaining rather than the individual bargaining or group bargaining which the respondent had urged in its April 26 bulletin. To attach this objective, the respondent summoned all its employees to meet in groups and to select representatives to consider establishment of a plan of collective bargaining. The group meetings were called by the respondent without regard to the fact that a

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[25] See *N. L. R. B.* v. *Elkland Leather Co.*, 114 F. (2d) 221, 223-224 (C. C. A. 3), cert. denied 311 U. S. 705, ent'g *Matter of Elkland Leather Co., Inc.* and *National Leather Workers Association, Local No.* 37, 8 N. L. R. B. 519, and decisions cited in footnote 36, page 20, below.

majority of the employees had not yet determined the form of self-organization, if any, that they desired. Thereafter, the respondent called meetings of the representatives to be held at Norfolk and Richmond. The employee representatives attended pursuant to the call from the respondent and not as a result of any spontaneous desire of the employees for self-organization on a company-wide basis. At these two simultaneous conferences the respondent urged not only the formation of "a bargaining agency," but also the kind of bargaining agency which the employees were to form, namely, an organization confined to employees of the Company. They were not to join or affiliate with any "outside" organization. This is clear from the respondent's insistence on an organization of their *own*, with their *own* officers and adviser and their *own* bylaws and rules. [fol. 111] By pushing forward its plan the respondent prevented selection of representatives who were not employees of the respondent, although the Act specifically provides that employees must be free to choose such representatives. Moreover, the messages made it clear that the employees were limited to the formation of a company-wide organization. Shortly following the posting of the April 26 bulletin and at the behest of Superintendent Bishop, a large majority of the Norfolk transportation employees had organized into a group for collective bargaining.[26] Now, however, the messages stressed that the respondent could not deal with this and the other groups of employees which had submitted petitions; to do so was "not the logical procedure." To bargain "in an orderly manner" it was essential that the group bargained with should consist of all "similar operators"; in other words, "all interested groups should be represented in these discussions," as the messages specifically stated. Thus the respondent closed the door to voluntary self-organization and laid down the requirement that any employee organization must be on a company-

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[26] Superintendent Bishop, as noted above, sought to guide this group into channels he deemed desirable; he suggested that the men "form their own organization," and warned against the C. I. O. and other nationally affiliated organizations, characterizing them as "trouble makers" and asserting that the respondent would not recognize them.

wide basis.[27] In short, the respondent imposed its own preconceived pattern of organization upon the employees. President Holtzclaw's concluding promise in the message, that any wage increase granted would be made retroactive, was nicely calculated to spur the representatives zealously to carry out the respondent's proposal.[28] So too, by withdrawing from the meeting place and suggesting that the employee representatives remain for further discussion, the respondent's officials provided a medium ideally suited to the incubation of their plan. In such a setting, the respondent's bulletins and speeches were not mere expressions of opinion but constituted an integral part of the respondent's course of conduct designed to cause its employees to abandon their right to self-organization and to submit to the will of the respondent.

As a result, when the employee representatives reported the respondent's message, including its instruction to form

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[27] While the respondent's statements did not in so many words direct the employees to form a single company-wide organization, we are of the opinion that, from the language of the statements, the firm rejection of bargaining with smaller groups of employees, and the company-wide selection of representatives to compose the two audiences, the employees reasonably inferred that only through a company-wide organization could there be collective bargaining with the respondent and that the respondent expected them to evolve such a plan.

[28] *M. H. Ritzwoller Co.* v. *N. L. R. B.*, 114 F. (2d) 432, 435 (C. C. A. 7) enf'g *Matter of M. H. Ritzwoller Company* and *Cooper's International Union of North America, Local No. 28*, 15 N. L. R. B. 15; *N. L. R. B.* v. *Viking Pump Co.*, 113 F. (2d) 759, 760 (C. C. A. 8), cert. denied 312 U. S. 680, enf'g *Matter of Viking Pump Company* and *Steel Workers Organizing Committee*, 13 N. L. R. B. 576; *F. W. Woolworth Co.* v. *N. L. R. B.*, 121 F. (2d) 358, 660 (C. C. A. 2), enf'g *Matter of F. W. Woolworth Company et al.* and *United Wholesale & Warehouse Employees of New York, Local 65*, 25 N. L. R. B. 1362; *N. L. R. B.* v. *American Potash and Chemical Corp.*, 98 F. (2d) 488, 494 (C. C. A. 9), cert. denied, 306 U. S. 643, enf'g *Matter of American Potash & Chemical Corporation* and *Borax & Potash Workers Union No. 20181*, 3 N. L. R. B. 140.

their "own" organization, to the men in the various de- [fol. 112] partments,[29] the decision to form a company-wide unaffiliated organization quickly followed. Thereupon, the employee representatives, commissioned to bring the projected organization into being, repeatedly met on company time and property without objection from the respondent, and sought and received from the respondent detailed information as to respondent's operations and personnel. The respondent thus gave material assistance to the organization of the I. O. E. during its critical formative period,[30]

At the same time, the respondent continued its interference with the activities of adherents of affiliated unions, as is evidenced by the sudden discharge of Everard N. Mann, an open advocate of C. I. O. affiliation, on the eve of the important June 1 meeting,[31] by the activity of Supervisor Edwards in maintaining surveillance of C. I. O. meetings and threatening C. I. O. supporters with discharge, and by the statement of Superintendent Bishop, made at a time when he was seeking to induce employees to cooperate in the plan for an unaffiliated, company-wide organization, that the respondent would "fight" affiliated organizations.

We are of the opinion and find that the success of I. O. E. organizers in securing the signatures of a majority of the respondent's 3,000 widely scattered employees within 2 weeks after the new organization was formally launched,

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[29] In some departments, as we have found, the meetings at which the employee representatives reported were held with the active cooperation of the respondent's supervisory officials.

[30] See *Western Union Telegraph Company* v. *N. L. R. B.*, 113 F. (2d) 992, 995 (C. C. A. 2), enf'g *Matter of Western Union Telegraph Company* and *American Communications Association*, 17 N. L. R. B. 34; cf. *Kansas City Power and Light Company* v. *N. L. R. B.*, 111 F. (2d) 340, 349 (C. C. A. 8), enf'g as modified *Matter of Kansas City Power & Light Company* and *International Brotherhood of Electrical Workers*, 12 N. L. R. B. 1414; *N. L. R. B.* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870 (C. C. A. 5), cert. denied 310 U. S. 651, enf'g *Matter of Brown Paper Mill Company, Inc.* and *International Brotherhood of Paper Makers*, 12 N. L. R. B. 60.

[31] Mann's discharge is discussed in Section D, *infra*.

must be attributed in large part to the respondent's sponsorship of and assistance to the I. O. E. and its persistent and well-known opposition to national unions.

Finally, we have considered the promptness with which the respondent agreed to grant the I. O. E. a check-off of dues and a closed shop. This constituted a complete reversal of attitude. When it had been a question of the employees joining a nationally affiliated union, the respondent, in its April 26 bulletin, expressed opposition toward the closed shop and the check-off. At the hearing, too, the respondent's officials expressed strong opposition to the closed shop in principle. Yet when the I. O. E. sought the check-off, the respondent at once agreed, and, after a comparatively few hours discussion on July 30 and 31, 1937, acquiesced in the demand of the I. O. E. for a closed shop. The result was that all of the respondent's employees were forced to join and pay dues to the I. O. E. or lose their jobs. We are persuaded, and find, that the respondent agreed to the closed shop and the check-off of I. O. E. dues in order to entrench the I. O. E. among the employees and to insure its financial stability.

We turn to an evaluation of defenses asserted by the respondent. The respondent contends, with respect to its employment of an undercover operative to report on the organization activities of the Norfolk employees, that reporting on such matters was not the primary responsibility of this operative, that he had not in fact submitted any reports on labor matters since 1934, and that in these circumstances no significance should be attached to the use of his services. Assuming that the operative did not submit [fol. 113] any reports on labor matters after the passage of the Act,[32] the respondent nevertheless continued after the passage of the Act to employ an undercover operative to

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[32] T. Norman Jones, a vice president of the respondent and a witness for the respondent, testified on direct examination that he had heard that a report was received from this operative in March 1937 to the effect that someone was planning to organize the men at the Reeves Avenue Power Station. On cross-examination he testified that he was "uncertain" about the matter and did "not wish to swear" that the information which he received was obtained through the undercover operative.

report on incipient union activities among the Norfolk employees—an operative who by posing as an ardent supporter of organized labor had insinuated himself into a strategic position to uncover any movement to organize the respondent's employees. In so doing the respondent engaged in an unfair labor practice, irrespective of whether the employees were aware of this operative's activities. Our experience establishes that employers resort to labor espionage for the purpose of obstructing and destroying self-organization.[33] To be effective it must necessarily be secret; it is nonetheless effective in restraining the employees in the exercise of their rights under the Act on this account.[34] We find that the respondent, by employing an undercover operative to report on the organizational activities of its Norfolk employees and by questioning employees suspected of engaging in union activities as to such matters, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

As regards the April 26 bulletin, we are not unmindful of the respondent's argument that its reference to the employees' right to join the union of their choice and its statement that no employee would suffer because of his membership, assured the employees of its impartiality, and that hence the employees could not have been restrained in their choice of representatives by any statement contained in the bulletin. We do not agree, however, that the respondent's brief reference to the employees' rights under the Act ren-

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[33] The conclusions of the LaFollette Committee concerning industrial espionage fully confirm the Board's experience. Sen. Rep. No. 46, Part 3, 75th Cong., 2nd Sess., pp. 8-9.

[34] *Bethlehem Steel Company* v. *N. L. R. B.*, 120 F. (2d) 641, 647 (App. D. C.), enf'g *Matter of Bethlehem Steel Corporation et al.* and *Steel Workers Organizing Committee*, 14 N. L. R. B. 539; *N. L. R. B.* v. *Baldwin Locomotive Works*, 128 F. (2d) 39, 50 (C. C. A. 3), enf'g *Matter of The Baldwin Locomotive Works* and *Steel Workers Organizing Committee*, 20 N. L. R. B. 1100; *N. L. R. B.* v. *Grower-Shipper Vegetable Association*, 122 F. (2d) 368, 376 (C. C. A. 9), enf'g in this respect *Matter of Grower-Shipper Vegetable Association et al.* and *Fruit and Vegetable Workers Union of California, No. 18211*, 15 N. L. R. B. 322.

dered the employees wholly free with respect to joining unions. On the contrary, in view of the respondent's past hostility to labor organizations, and in view of the timing of the bulletin, after nationally affiliated organizations had attempted to organize the employees and at a time when the Supreme Court decisions sustaining the validity of the Act rendered further attempts imminent, we believe that the employees could not fail to be discouraged from joining "national" labor organizations by the respondent's action in posting the bulletin, which, as a whole, so clearly showed the respondent's opposition to their taking such a step. The respondent's subsequent activities, including its successful effort to effect the formation of a company-wide organization and the discharge of Mann because of his opposition to such an organization,[35] cast revealing light on the respondent's motives in posting the bulletin. Viewing the bulletin in the light of the background in which it was posted [fol. 114] and the respondent's subsequent activities, we find the bulletin clearly coercive. We accordingly find that the posting of the bulletin was an integral part of the respondent's conduct, and as such, interfered with, restrained, and coerced the respondent's employees in the exercise of the rights guaranteed in Section 7 of the Act.[36]

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[35] Mann's discharge is discussed in Section D below.

[36] See *N. L. R. B.* v. *Elkland Leather Co.*, 114 F. (2d) 221, 223-224 (C. C. A. 3), cert. denied 311 U. S. 705, enf'g *Matter of Elkland Leather Co., Inc.* and *National Leather Workers Associated Local No. 37*, 8 N. L. R. B. 519; *Valley Mould & Iron Corp.* v. *N. L. R. B.*, 116 F. (2d) 760, 766 (C. C. A. 7), cert. denied 313 U. S. 590, enf'g *Matter of Valley Mould and Iron Corporation* and *Steel Workers Organizing Committee*, 20 N. L. R. B. 211; *American Enka Corp.* v. *N. L. R. B.*, 119 F. (2d) 60, 62-63 (C. C. A. 4), enf'g *Matter of American Enka Corporation* and *Textile Workers Union No. 22129*, 27 N. L. R. B. 1057; *N. L. R. R. B.* v. *Blossom Products Corp.*, 121 F. (2d) 260, 261-262 (C. C. A. 3), enf'g *Matter of Blossom Products Corporation* and *International Ladies Garment Workers Union*, 20 N. L. R. B. 335; *N. L. R. B.* v. *Peter Pan Company of Winchester, Inc.*, decided June 1, 1942, 10 L. R. R. 494, enf'g *Matter of Peter Pan Company, Inc. et al.* and *United Garment Workers of*

The respondent contends that it arranged the May 24 meetings to point out to the employees the impracticability of bargaining separately with each small group which might desire a change in existing wages, hours, and working conditions, and to give them an opportunity to decide whether they desired to organize on a basis which would render bargaining feasible. The employees have the right, however, to organize upon any basis they see fit; they are not required to organize upon the particular basis that suits the convenience of the employer. The respondent in advising the employees' representatives that bargaining by "various departments and various occupations" was "not the logical procedure," and that "all interested groups should be represented in the discussions," encroached upon a field of activity reserved exclusively to employees.[37] Moreover, the respondent in the May 24 message urged the employees in so many words to proceed with "the formation of a bargaining agency," not any bargaining agency as the respondent contends, but a company-wide unaffiliated organization, as we have found. For these reasons the contention that the respondent at the May 24 meeting merely gave the employees the opportunity to decide whether or not they wanted to bargain must be rejected.

The respondent further contends that since it included in the message a statement of the employees' rights under the Act and declared that no employee would be discriminated against because of his choice of unions, any suggestion that it might have made in the message that the employees form a company-wide organization could not have impaired the employees' free choice of representatives. We cannot agree that the message left the employees the complete and unfettered freedom of choice of representatives contemplated by the Act. Evaluating the message as a whole

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America, 21 N. L. R. B. 522, 535-537, 540-543; compare the "Sasser statement" in *System Federation No. 40* v. *Virginian Ry. Co.*, 11 F. (2d) 621, 624-625, 633, aff'd 84 F. (2d) 641 (C. C. A. 4), aff'd 300 U. S. 515.

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[37] Cf. *Corning Glass Works* v. *N. L. R. B.*, 118 F. (2d) 625 (C. C. A. 2), enf'g *Matter of Corning Glass Works Macbeth-Evans Division* and *Federation of Flat Glass Workers of America*, 15 N. L. R. B. 598.

in light of the respondent's long-standing opposition to the organization of the employees, the anti-union activities of Superintendent Bishop, the bulletin of April 26 appealing to the employees to ignore the overtures of the organizers of nationally affiliated organizations, the discharge of Mann for advocating affiliation with a "national" union,[38] [fol. 115] and the respondent's subsequent support of the proponents of the I. O. E. and interference with the activities of the adherents of nationally affiliated organizations, and giving due regard to the sensitivity of employees to even subtle expressions of preference on the part of their employers,[39] we find that the respondent, in urging upon the employee representatives the formation of a bargaining agency of their "own," impaired the employees' free choice of representatives, notwithstanding the respondent's reference in the message to the employees' rights under the Act.

Upon all the facts, we are convinced and find that the May 24 meetings were arranged and the respondent's message to the employees was prepared for the purpose of bringing about the formation of a company-wide unaffiliated organization. The messages themselves contain, as we have found above, a thinly disguised plea for the formation of just such an organization. Had not the respondent been determined to effect the formation of such an organization there would have been no lawful occasion for the respondent's arranging the May 24 meetings as it did, for it had only recently "advised" the employees concerning their rights under the Act. The whole procedure of the

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[38] See Section D below.

[39] *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 78, aff'g 110 F. (2d) 29 (App. D. C.), enf'g *Matter of The Serrick Corporation* and *International Union, United Automobile Workers of America, Local No. 459*, 8 N. L. R. B. 621; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 598-599, enf'g *Matter of Link-Belt Company* and *Steel Workers Organizing Committee*, 12 N. L. R. B. 854; N. L. R. B. v. *Virginia Electric and Power Company*, 314 U. S. 469, 477, remanding 115 F. (2d) 414 (C. C. A. 4), reversing *Matter of Virginia Electric & Power Company* and *Transport Workers Union of America, et al.*, 20 N. L. R. B. 911.

May 24 meetings was obviously chosen with a view to facilitating the formation of the desired organization. Not satisfied with the bulletin board method of transmitting messages to the employees, which the respondent had utilized in the past, this time the respondent delivered its message personally to representatives of the employees chosen at the respondent's behest. This strategy enabled the respondent to obtain a spokesman for its project in almost every department. The device of withdrawing from the meeting places and suggesting that the employee representatives remain for further discussion, we believe was intended to give them an opportunity to formulate their plans before consulting with their constituents and thus to expedite the formation of an organization.[40] We conclude, therefore, that the respondent arranged the meetings and urged upon the employees the formation of a company-wide unaffiliated organization because it feared the course the employees might pursue if the respondent did not intervene, that the respondent did so in a further effort to control the exercise by its employees of their right to self-organization, and that in doing so the respondent injected itself into a sphere of activity reserved exclusively to its employees and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

As regards the respondent's assistance to the I. O. E. during its formative stage, we are not impressed by the respondent's contention that it had no knowledge that the meetings of the committees were being held on its premises. [fol. 116] We think it very unlikely that sizeable groups of employees could have met after the close of business on

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[40] The effectiveness of this strategy is shown by the fact that the the employee representatives at the May 24 meetings were largely responsible for the formation of the I. O. E., although prior to May 24 they had not, for the most part, even considered the necessity of forming a labor organization. Not only did the employee representatives constitute a large majority of the preliminary steering committees, but 8 of 10 members of the general committee, the governing body of the I. O. E., were May 24 representatives, as were 18 of the 27 representatives elected by the various voting sections of the I. O. E.

seven or more occasions in the respondent's buildings, buildings in which the employees for the most part were not employed, without this fact becoming known at least to persons whose duty it was to report such unusual occurrences to responsible supervisory officials of the respondent. In addition, on May 28 and 29 copies of local newspapers at Norfolk, introduced into evidence by the respondent, reported meetings of employees at which they decided to form an unaffiliated organization and also announced the meeting to be held in the respondent's office building on June 1. Despite this advance notice that the Norfolk employees proposed to use its property for the purpose of forming a labor organization, the respondent made no objection when the Norfolk employees met on its property, not only on June 1 but also on June 7 and 11 as well. In view of these circumstances, we find that the respondent gave tacit, if not express, consent to the use of its premises. The respondent's acquiescence in the repeated use of its premises for organizational meetings of the I. O. E., particularly when contrasted with respondent's attitude towards the use of company time and property by organizers for "national" unions, not only facilitated the efforts of the I. O. E. organizers to form the organization but also constituted a concrete demonstration of the respondent's approval of the project.[41]

We must reject the respondent's contention that no significance should be attached to the use of its premises by the I. O. E. organizers because it occurred only "in the initial groping for some plan of organization." It is dur-

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[41] *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318, 333, 335, 336, enf'g *Matter of Bradford Dyeing Association (U. S. A.)* and *Textile Workers Organizing Committee*, 4 N. L. R. B. 604; *Titan Metal Mfg. Co.* v. *N. L. R. B.*, 106 F. (2d) 254, 257, 258, 262 (C. C. A. 3), cert. denied 308 U. S. 615, enf'g *Matter of Titan Metal Manufacturing Company* and *Federal Labor Union No. 19981*, 5 N. L. R. B. 577; *New Idea, Inc.* v. *N. L. R. B.*, 117 F. (2d) 517, 521, 523-524 (C. C. A. 7), enf'g *Matter of New Idea, Inc.* and *International Association of Machinists et al.*, 21 N. L. R. B. 223; *N. L. R. B.* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870 (C. C. A. 5), cert. denied 310 U. S. 651, enf'g *Matter of Brown Paper Mill Company, Inc.* and *International Brotherhood of Paper Makers*, 12 N. L. R. B. 60.

ing this period that that employer support is most effective. Once an organization is formally established, it can often continue to function, without employer support. During the critical formative stage, however, particularly where the proponents of the organization are acting, as in this case, not upon their own iniative but in response to the urgings of their employer, employer support is extremely vital. We find that the respondent's support of the I. O. E. organizers during "the initial groping" period contributed materially to the success of the I. O. E. organizers in bringing about the formation of that organization.[42]

Upon all the facts summarized above, we conclude that the I. O. E. was not the result of the employees' free choice; that it was initiated in response to the urgings of the respondent at the May 24 meetings to set up their "own" [fol. 117] organization; that the respondent's support of the organization during the critical formative period and its consistent opposition to nationally affiliated organizations are largely responsible for the adherence of the employees to the organization; and that the contract with the I. O. E. granting a closed shop and the check-off of the I. O. E. dues marked the climax of the respondent's efforts to erect an unaffiliated organization as a bulwark against nationally affiliated organizations. We find that the respondent has dominated and interfered with the formation and administration of the I. O. E. and has contributed support to it, and has in this and the other respects set forth above interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

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[42] See *Western Union Telegraph Company* v. *N. L. R. B.*, 113 F. (2d) 992, 995 (C. C. A. 2), enf'g *Matter of Western Union Telegraph Company* and *American Communications Association*, 17 N. L. R. B. 34; cf. *Kansas City Power and Light Company* v. *N. L. R. B.*, 111 F. (2d) 340, 349 (C. C. A. 8), enf'g as modified *Matter of Kansas City Power & Light Company* and *International Brotherhood of Electrical Workers*, 12 N. L. R. B. 1414; *N. L. R. B.* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870 (C. C. A. 5), cert. denied 310 U. S. 651, enf'g *Matter of Brown Paper Mill Company, Inc.* and *International Brotherhood of Paper Makers*, 12 N. L. R. B. 60.

D. *Discriminatory discharges and lay-offs*

Joseph Bolton. Bolton was employed by the respondent in September 1926 as a bus operator in the Norfolk division. He was discharged on January 13, 1938. In his Intermediate Report the Trial Examiner found that the respondent's discharge of Bolton was not discriminatory and recommended that the complaint as to him be dismissed. The Amalgamated, which had filed the charges as to Bolton, filed no exceptions to the Intermediate Report. We have examined the record with respect to Bolton and we agree with the Trial Examiner's finding. We shall accordingly dismiss the complaint insofar as it alleges that by discharging Bolton the respondent discriminated in regard to his hire and tenure of employment.

Everard M. Mann. Mann was employed by the respondent as a street car operator in Norfolk on July 29, 1936. As we have heretofore noted, at one of the meetings of Norfolk transportation employees held on May 11, 1937, on the respondent's premises at Superintendent Bishop's suggestion, Mann protested vigorously against the formation of an inside union, advocated that the employees affiliate with either the C. I. O. or the Amalgamated, and stated that he preferred the C. I. O., which he joined shortly after the meeting. Thereafter he continued to urge his fellow employees to join a union having national affiliation. On May 27, 1937, Mann, who had spoken to Bishop a few days earlier with reference to obtaining a personal loan of $50 from the respondent, walked into the dispatcher's office at Norfolk and, unaware that Superintendent Bishop was there, loudly inquired, "Has anybody seen this guy Bishop?" Bishop, who was in the office reading a newspaper, lowered it, and the dispatcher said, "Mr. Bishop is sitting right over there." Mann looked at Bishop, but said nothing and walked out. On June 1, the day upon which meetings were scheduled to be held at both Richmond and Norfolk to lay plans for the formation of an unaffiliated organization, Bishop discharged Mann, on the ground that he had been disrespectful to him. Bishop testified that he was embarrassed by Mann's disrespectful reference to him in the presence of other employees, and that he discharged him on this account after consulting with Vice-President Throckmorton. Bishop also testified that Mann

had a poor accident record, but stated that this was not the immediate cause of his discharge. Mann's accident record, while not good, was admittedly better than those of many operators retained by the respondent in its employ.

We are of the opinion that Mann was discharged because of his union activities and not because of the incident relied upon by Bishop. As stated above, Mann was one of the first employees to take a firm stand against an unaffiliated organization and to advocate affiliation with a national union. Bishop's opposition to affiliated organizations is clear, not only from his action in seeking out employees and questioning them concerning union matters each time [fol. 118] he suspected them of attempting to organize,[43] but from his blunt statements to the effect that unions were "no good," that they were nothing but "trouble makers," and that the respondent would fight them to the limit. We are convinced, upon the entire record, that Bishop seized upon the incident of May 27 as a pretext to get rid of Mann, and that it was intended as a warning to those employees also favoring affiliation with a national organization as to what the future held in store for them. Although Bishop stated that he had no knowledge of Mann's union activity, Warren Bishop, his son, was present throughout the May 11 meeting at which Mann spoke. Bishop denied that he had ever obtained any information regarding the labor activities of the employees from his son, or that he had discharged Mann for his union activity, but offered no explanation why Warren Bishop, who was not an employee of the respondent, was present at the meeting. In view of Bishop's demonstrated antagonism to affiliated organizations, we do not find his denials convincing.

We find that, by discharging Everard M. Mann, the respondent discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the T. W. U., and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

A. F. Staunton and Robert E. Elliott, Jr. Staunton, a first-class lineman in the Norfolk distributing department,

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[43] Bishop, it should be noted, is the supervisory employee to whom Undercover Operative Walters submitted his report on labor activities.

and Elliott, a bus operator in the Norfolk transportation department, were discharged on November 4, 1937, because of their refusal to join the I. O. E. November 4, 1937, marked the end of the 90-day period which employees were given to join the I. O. E. under the closed-shop provision of the contract with that organization. The respondent defends these discharges principally upon the ground that they were required by the closed-shop provision of the contract with the I. O. E., which the respondent contends comes within the proviso of Section 8 (3) of the Act permitting employees to enter into such contracts with unassisted labor organizations representing a majority of the employees in appropriate bargaining units. However, in view of our findings as to the respondent's interference with, and domination and support of the I. O. E., that organization obviously cannot qualify as an organization not assisted by unfair labor practices; the closed-shop provision therefore is invalid, and Staunton's and Elliott's discharges necessarily fall within the ban of the Act.

The respondent further argues that Staunton was not discharged, but voluntarily chose to leave the respondent's employ. The record shows, however, that Staunton reported for work on November 4, as usual, but was not permitted to go to work by Superintendent of Distribution Crafton, who informed him that no one could go to work who was not a member of the I. O. E. Staunton refused to join, asserting, according to Crafton, that he would quit before he would sign up. It is thus apparent that Crafton conditioned Staunton's going to work upon his joining the I. O. E., a condition which, in view of our findings as to the invalidity of the closed-shop provision, he could not lawfully impose. We find that Staunton was not obliged to work subject to this illegal condition, and that Crafton's action in imposing this condition was tantamount to discharging him.

We find that the respondent discharged A. F. Staunton and Robert E. Elliott, Jr., because of their refusal to join the I. O. E., thereby discriminating in regard to hire and tenure of employment, encouraging membership in the I. O. E., and discouraging membership in the I. B. E. W. and T. W. U., of which they were active members, and thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

[fol. 119] *J. L. Judge and T. N. Harrell, Jr.* In the spring of 1938 the respondent practically completed an extensive rural electrification program upon which it had been engaged since 1936, necessitating a reduction in the number of employees in the distribution department. On March 31, 1938, 13 employees in the Norfolk distribution department were laid off, including Judge, a second-class lineman, and Harrell, a third-class lineman. The factors which the respondent took into consideration in selecting the employees to be laid off, according to William T. Crafton, the superintendent of the Norfolk distribution department in charge of personnel matters, were, "First, seniority; second, their ability; and third, their dependents."

Both Judge and Harrell were employed in April 1936 as temporary lineman's helpers, both received several wage increases in 1937, and both were reclassified as third-class linemen. On November 1, 1937, Judge was reclassified as a second-class lineman. Of the second-class linemen, Judge had the least seniority, having been with the respondent only since April 1936. The next youngest second-class lineman had been with the respondent almost 3 years longer than Judge. Of the 10 third-class linemen in the respondent's employ on March 31, 1938, Harrell had been with the respondent longer than 5 of them. All of these 5 employees were retained when Harrell was laid off.

Judge and Harrell were charter members of the I. B. E. W. which initiated organizing activities among the Norfolk distribution employees in June 1937. In August Judge was elected financial secretary and treasurer of the organization. Both employees were vigorous opponents of the I. O. E. and sought to expose the weaknesses of the organization; both at the time of their lay-offs were engaged in a campaign to build up the I. B. E. W. among the employees. Their membership in that organization was known to the respondent, Superintendent of Distribution Crafton having ordered Judge and Staunton to remove an I. B. E. W. notice, signed by them, from the respondent's bulletin board, and General Foreman May having been informed by Harrell of the fact that he had joined the I. B. E. W. shortly after he joined the organization.

The respondent contends that Judge was chosen to be laid off because he had the least seniority of any of the second-class linemen. Since it appears that Judge did have considerably less seniority than any other of the second-

class linemen, and since seniority was a factor to which the respondent uniformly gave weight in determining employees to be laid off, we are not persuaded that his union membership and activities were the cause of his selection to be laid off, although he was an able worker whose advancement had been exceptionally rapid.

The respondent urges that Harrell was selected to be laid off because he was continually becoming embroiled in altercations both with his fellow employees and with his supervisors. The respondent cites several instances of such altercations. Harrell himself made no attempt to conceal that he was rather hot-headed. We think it not unreasonable, in view of Harrell's quarrelsome disposition, that the respondent would select him to be laid off when a general reduction in force became necessary, particularly since there was little difference in seniority among the third-class linemen and all had been reclassified as third-class linemen on the same day. Moreover, at the time Harrell was laid off the respondent's relations with its employees were under the scrutiny of a representative of the Board in connection with the charges of domination which had been filed. This was scarcely an opportune time for the respondent to resort to anti-union discrimination.

We find that the respondent by laying off J. L. Judge and T. N. Harrell, Jr., did not discriminate in regard to their hire or tenure of employment, and we shall dismiss the allegations of the complaint with respect thereto.

[fol. 120] IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the respondent set forth in Section III, above, occurring in connection with the operations of the respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, commerce, transportation, and communication among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the respondent has engaged in unfair labor practices, we shall order that it cease and desist therefrom and that it take certain affirmative action which will effectuate the policies of the Act.

We have found that the respondent has dominated and interfered with the formation and administration of the I. O. E. and has contributed support to it. In order to effectuate the policies of the Act and free the employees of the respondent from such domination and interference, and the effects thereof, which constitute a continuing obstacle to the exercise by the employees of the rights guaranteed them by the Act, we shall order the respondent to withdraw all recognition from the I. O. E. as the representative of any of the respondent's employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment, and completely to disestablish it as such representative.[44]

Having found that the respondent entered into an invalid contract with the company-dominated I. O. E. providing for a closed shop and the deduction of I. O. E. dues from the employees' wages in a final effort to bulwark itself against nationally affiliated organizations, we shall order the respondent to cease and desist from giving effect to the said contract or to any extension, renewal, modification, or supplement thereof, or any successor contract with the I. O. E. which may now be in force. Nothing in this Decision or in our Order should be taken, however, to require the respondent to vary those wages, hours, and other substantive features of its relations with the employees themselves, if any, which the respondent established in the performance of such contract as extended, renewed, modified, supplemented, or superseded.[45]

We are of the opinion that, under the circumstances of this case, the respondent should be ordered to reimburse each employee for any amounts which the respondent has deducted from his wages for dues and assessments in the I. O. E. The respondent concluded a closed-shop contract with the I. O. E., a company-dominated organization, thus compelling its employees to become and remain members

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[44] See *N. L. R. B.* v. *Newport News Shipbuilding and Dry Dock Corporation*, 308 U. S. 241; *N. L. R. B.* v. *The Falk Corporation*, 308 U. S. 453; *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261.

[45] See *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 365-367.

of the illegal organization. Employees were in fact discharged because they refused to join the I. O. E. The check-off provision, a device by which the respondent assured the financial stability of the company-dominated organization, could no more be avoided by the employees than could the compulsory membership requirement. The bylaws of the I. O. E. required its members to execute check-off authorizations under penalty of being dropped from membership in the I. O. E., and thereby, under the [fol. 121] closed-shop provision, from their jobs. We find that the monies thus deducted from the wages of the employees constituted the price of retaining their jobs, a price coerced from them for respondent's purpose of supporting and maintaining the organization which respondent had dominated in order to thwart bona fide representation. We further find that, as a result of the imposition of the illegal closed-shop and check-off requirements, the employees suffered a definite loss and deprivation of wages equal to the amounts deducted from their wages and paid over to the I. O. E. It is appropriate that the employees be made whole by reimbursement of amounts exacted from them for illegal purposes. We find that in these circumstances,[46] the effects of the unfair labor practices may be fully remedied and the purposes and policies of the Act may be completely effectuated only by restoring the *status quo*. Hence, we shall order the respondent to reimburse its employees for the amounts deducted from their wages for dues and assessments in the I. O. E.

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[46] The propriety of an order requiring reimbursement of dues deducted from wages depends upon the particular circumstances of the case. In the particular circumstances of this case we regard the dues reimbursement requirement peculiarly "adapted to the situation which calls for redress." *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348. Cf. *Matter of Abraham B. Karron, doing business as Pennsylvania Handbag Frames Manufacturing Company* and *Local 1224, United Electrical, Radio, and Machine Workers of America*, 41 N. L. R. B. 1454, 1469; *Matter of Ohio Valley Bus Company* and *Division 1171, Amalgamated Association of Street, Electrical Railway & Motor Coach Employees of America*, 38 N. L. R. B. 838, 862, note 27.

Having found that the discharge of Everard M. Mann and A. F. Staunton were unfair labor practices we shall direct the respondent to reinstate each of them to his former position, without prejudice to his seniority, or other rights and privileges. We shall further order the respondent to make whole Mann and Staunton for any loss of pay they may have suffered by reason of the respondent's discrimination against them by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings.[47]

Although finding that Staunton had been discharged in violation of the Act the Trial Examiner did not recommend his reinstatement upon the grounds that he subsequently obtained regular and substantially equivalent employment. We are of the opinion, for reasons which we have heretofore set forth,[48] that regardless of whether Staunton obtained regular and substantially equivalent employment subsequent to his discharge his reinstatement is an appropriate means of effectuating the policies of the Act. We consequently find it unnecessary to pass upon the question of [fol. 122] whether or not Staunton's subsequent employment was regular and substantially equivalent. Since, however, the respondent could not have been expected to offer

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[47] By "net earnings" is meant earnings less expenses such as transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company* and *United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, and other work-relief projects shall be considered as earnings. See *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7.

[48] See *Matter of Ford Motor Company* and *International Union, United Automobile Workers of America, Local Union No. 249*, 31 N. L. R. B. 994, 1099-1100; *Phelps Dodge Corporation* v. *N. L. R. B.*, 313 U. S. 177.

Staunton reinstatement during the period the Trial Examiner's Intermediate Report was outstanding, we shall direct that the period from the date of the Intermediate Report to the date of our original Decision and Order herein be excluded in the computation of back pay due him.

Having also found that the lay-off of Robert E. Elliott, Jr., was an unfair labor practice we would normally order his reinstatement with back pay. The respondent, however, has adduced convincing evidence that the normal remedy of reinstatement with back pay should be withheld in Elliott's case. On April 12, 1937, a Monday (the day upon which the weekly passes are sold) Elliott had an accident in which over $100 of the respondent's money disappeared. On November 1, 1937, also a Monday, and but 2 days before the deadline for joining the I. O. E. under the respondent's contract with the organization, Elliott had a second accident in which he reported losing $75 of the respondent's money. He never reported for work after this accident and was discharged on November 4, 1937, for failing to join the I. O. E. as required by the respondent's contract with that organization. The respondent's physician, who examined Elliott on the day after the accident reported that he could observe no objective symptoms of any injury and it appears that Elliott was not confined to his bed by his injury. The respondent was unable to locate any of the persons named as witnesses to the accident by Elliott. Raymond G. Carroll, the manager of the Norfolk transportation department, testified that after investigation he concluded that the report was a misrepresentation and that the respondent on November 6, a regular pay day, declined Elliott's request for his past 2 weeks' pay pending a final determination of the matter. Elliott filed a suit for his back wages against the respondent in the Civil Justice Court of the city of Norfolk which the respondent resisted by filing a plea of set-off. This suit had not been brought to trial at the time of the hearing in the case and the respondent has not, so far as appears in the record, paid Elliott his final wages. Subsequently Elliott filed a claim for compensation with the Industrial Commission of Virginia. The opinion of

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[49] This opinion was not before us when we handed down our original decision herein.

the Commission dated December 22, 1938,[49] of which we take judicial notice, recites as follows:

The claimant recites the fact that he had an accident but further did not produce any witnesses to same. The defendant showed by preponderance of evidence that the accident did not occur. The burden of proof is upon the claimant to make his claim and as he has failed to do so, this claim is dismissed.

Thus it appears that from the time it first had an opportunity to investigate Elliott's November 1, 1937, accident the respondent has been of the conviction that Elliott falsely reported losing the respondent's money. It further appears that the respondent has acted pursuant to conviction, not only by refusing to pay Elliott his final wages when they were due, but by defending its position in every tribunal to which Elliott took his case. While we do not find that Elliott falsely reported losing respondent's funds, nevertheless, in this situation we do not think that it would effectuate the policies of the Act to require the respondent to restore Elliott to his former position. We shall, therefore, not require Elliott's reinstatement with back pay.

The respondent's entire course of conduct, including its many and varied forms of interference, restraint, and coercion, its domination and support of the I. O. E., and its [fol. 123] discriminatory discharges discloses a fixed purpose on the part of respondent to defeat self-organization and its objects. Because of the respondent's unlawful conduct in the past and its underlying purpose we are convinced that there is a danger of the respondent engaging in other related unfair labor practices prescribed by the Act in the future. The preventive purpose of the Act will be thwarted unless our order is coextensive with the threat. In order, therefore, to make effective the interdependent guarantees of Section 7, to prevent a recurrence of unfair labor practices, and thereby to minimize strife which burdens and obstructs commerce, and thus effectuate the policies of the Act, we shall order the respondent to cease and desist from in any manner infringing the rights guaranteed in Section 7 of the Act.

Upon the basis of the above findings of fact, and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. Transport Workers Union of America, Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, International Brotherhood of Electrical Workers, and The Independent Organization of Employees of Virginia Electric and Power Company, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By dominating and interfering with the formation and administration of The Independent Organization of Employees of Virginia Electric and Power Company, and contributing support to it, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (2) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Everard M. Mann, Robert E. Elliott, Jr., and A. F. Staunton; and thereby discouraging membership in Transport Workers Union of America, Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, and International Brotherhood of Electrical Workers, and encouraging membership in The Independent Organization of Employees of Virginia Electric and Power Company, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

6. By discharging Joseph Bolton and laying off J. L. Judge and T. N. Harrell, Jr., the respondent has not engaged in unfair labor practices within the meaning of Section 8 (3) of the Act.

Order

On the basis of the above findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board

hereby orders that the respondent, Virginia Electric and Power Company, Richmond, Virginia, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Dominating or interfering with the formation and administration of The Independent Organization of Em- [fol. 124] ployees of Virginia Electric and Power Company, or the formation or administration of any other labor organization of its employees, or contributing support to The Independent Organization of Employees of Virginia Electric and Power Company, or any other labor organization of its employees;

(b) Giving effect to its contract heretofore described with The Independent Organization of Employees of Virginia Electric and Power Company, or to any extension, renewal, modification, or supplement thereof, or to any successor contract with The Independent Organization of Employees of Virginia Electric and Power Company which may now be in force;

(c) Discouraging membership in Transport Workers Union of America; Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America; International Brotherhood of Electrical Workers, or any other labor organization of its employees, or encouraging membership in The Independent Organization of Employees of Virginia Electric and Power Company, or any other labor organization of its employees, by discharging, laying off, or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purposes of collective bargaining and other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Withdraw all recogniti n from The Independent Organization of Employees of Virginia Electric and Power

Company as the representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of employment, and completely disestablish The Independent Organization of Employees of Virginia Electric and Power Company as such representative;

(b) Offer to Everard M. Mann and A. F. Staunton immediate and full reinstatement to their former positions without prejudice to their seniority and other rights and privileges;

(c) Make whole Everard M. Mann for any loss of pay he may have suffered by reason of the respondent's discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his discharge or lay-off to the date of the offer of reinstatement, less his net earnings during said period;

(d) Make whole A. F. Staunton, for any loss of pay he may have suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from the date of his discharge to September 13, 1938, the date of the Intermediate Report, and from February 27, 1940, the date of our original Decision and Order, to the date of the respondent's offer of reinstatement, less his net earnings during said periods;

(e) Reimburse each of its employees for all the dues and assessments, if any, which it has deducted from his or her wages on behalf of The Independent Organization of Employees of Virginia Electric and Power Company;

[fols. 125-309] (f) Post immediately in conspicuous places throughout the respondent's system and maintain for a period of at least sixty (60) consecutive days notices to its employees stating: (1) that the respondent will not engage in the conduct from which it has been ordered to cease and desist in paragraphs 1 (a), (b), (c), and (d); (2) that it will take the affirmative action set forth in paragraphs 2 (a), (b), (c), (d), and (e) of this Order; and (3) that the respondent's employees are free to become or remain members of Transport Workers Union of America, Amalgamated Association of Street, Electrical Railway,

and Motor Coach Employees of America, or International Brotherhood of Electrical Workers, and that the respondent will not discriminate against any employee because of membership or activity in such organizations;

(g) Notify the Regional Director for the Fifth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith;

And It Is Further Ordered that the allegations of the complaint with respect to Joseph Bolton, T. N. Harrell, Jr., and J. L. Judge be, and they hereby are, dismissed.

Signed at Washington, D. C., this 24th day of September 1942.

Harry A. Millis, Chairman, Wm. M. Leiserson, Member, Gerard D. Reilly, Member, National Labor Relations Board. (Seal.)

[fol. 310] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5013

VIRGINIA ELECTRIC AND POWER COMPANY, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 5020

THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC AND POWER COMPANY, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition to Set Aside an Order of the National Labor Relations Board

OPINION—Filed December 9, 1942

(Argued November 23, 1942. Decided December 9, 1942)

[fol. 311] Before Parker, Soper and Dobie, Circuit Judges

George D. Gibson and T. Justin Moore (Hunton, Williams, Anderson, Gay & Moore on brief) for Petitioner in No. 5013; Wm. Earle White (Paul E. Hadlick on brief) for

Petitioner in No. 5020; and Robert B. Watts, General Counsel, National Labor Relations Board, (Ernest A. Gross, Associate General Counsel; Howard Lichtenstein, Assistant General Counsel; Ruth Weyand and Owsley Vose, Attorneys, National Labor Relations Board, on brief) for Respondent.

PARKER, Circuit Judge:

These are petitions by the Virginia Electric and Power Company, hereafter called the company, and the Independent Organization of Employees of the Virginia Electric and Power Company. hereafter called the I. O. E., to set aside an order of the National Labor Relations Board ordering the disestablishment of the I. O. E. as a company dominated organization, reinstatement with back pay of two discharged employees and reimbursement of employees for deductions from wages of amounts paid the I. O. E. under a check-off agreement. The Board asks that the order be enforced. The case was before us two years ago, when we entered an order setting aside the order of the Board theretofore entered. *Virginia Electric & Power Co.* v. *N. L. R. B.*, 4 Cir. 115 F. 2d 414. The Supreme Court granted certiorari and reversed our decision with direction that the case be remanded to the Board for redetermination of the issues in the light of that Court's opinion. *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 62 S. Ct. 344. This was done, and the case was heard by the Board on the record made at the prior hearing, without the introduction of additional testimony.

[fol. 312] The portion of the order directing disestablishment of the I. O. E. is assailed on the ground that it is not supported by substantial evidence. This, however, was the ground of our former decision setting aside the Board's order; and the reversal of that decision by the Supreme Court precludes another holding that the identical evidence is insufficient. The case is precisely similar to that in which an appellate court reverses a non suit or judgment upon a verdict directed for defendant on the ground of the insufficiency of the evidence. In such case the lower court upon remand is not limited in the reception of evidence, nor is it precluded from rendering any judgment that may be appropriate upon the new trial granted; but, as to the effect of the evidence passed upon by the appellate court, the

decision of that court is final and the lower court may not again grant a non suit or direct a verdict upon the same or substantially similar evidence. To that extent the decision of the appellate court becomes the law of the case. 3 *Am. Jur.* 553; 5 *C. J. S.* 1508; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 456; *Dodd* v. *Union Indemnity Co.*, 4 Cir. 32 F. 2d 512; *Priester* v. *Southern R. Co.*, 4 Cir. 6 F. 2d 878; *Carpenter* v. *Durell*, 6 Cir. 90 F. 2d 57; *Claiborne-Reno Co.* v. *E. I. duPont de Nemours & Co.*, 8 Cir. 77 F. 2d 565; *Gulf, Mobile & Northern R. Co.* v. *Hardy*, 151 Miss. 113, 117 So. 536, 61 A. L. R. 1073; *Warehouse* v. *Everett*, 141 Wash. 339, 252 Pac. 157, 58 A. L. R. 1482; *Mahany* v. *Kansas City Railways Co.*, — Mo. —, 254 S. W. 16, 29 A. L. R. 817; *White* v. *Int. Text Book Co.*, — Iowa —, 136 N. W. 121, 42 L. R. A. (N. S.) 346. There is nothing in *Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364, upon which the company relies, to indicate that the same rule is not to be applied to decisions on appeal to the Supreme Court from judgments of the Circuit Courts of Appeals dealing with orders of the Labor Board. That case involved no consideration of the sufficiency of the evidence by the Supreme Court, but merely the power of the Circuit Court of Appeals to remand a case to the Board for the purpose of setting aside its findings and order and making its decision and order upon reconsideration. That is a very [fol. 213] different matter from directing, as was done here, that the case be remanded for the Board to clarify its findings so as to show whether in reaching its conclusion it had or had not acted upon an erroneous theory of law.

In our former opinion we discussed at length the very matters upon which petitioners now rely and reached the conclusion that the order of disestablishment was not supported by substantial evidence. It was our decision, and not that of the Board, which was reviewed by the Supreme Court; and proper respect for that court requires the assumption that it would not have reversed a decision based on the insufficiency of the evidence unless it had deemed that decision erroneous. Certainly the court would not have remanded the case for clarification of the findings, if the evidence before it, as we held, was insufficient to sustain any finding of domination. The case is not one involving insufficient findings where there is a remand in order that sufficient findings may be made. There was a clear finding

of company domination accompanied by a comprehensive finding of evidentiary facts; but, because of expressions used by the Board, the Supreme Court was not certain that the finding of domination was not based upon certain of these evidentiary facts alone, i. e. the bulletin of April 26 and the speeches of May 24, without their being considered in connection with the other evidence. It was not suggested by anyone that the case be remanded for the taking of further evidence; and it is inconceivable that the court would have reversed our decision and directed further action by the Board unless it had been of opinion that the evidence was such that the Board could properly take action upon it and had intended so to decide.

While the court did not say in so many words that there was substantial testimony in the record which would justify Board action, it was made very clear that the Board would have been sustained if its order had been based on the totality of the evidence and there had been no question as to its being based solely on the bulletin and the speeches. In this connection the court said:

[fol. 314] "The command of sec. 10(e) of the Act that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' precludes an independent consideration of the facts. Bearing this in mind, we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act. But here the Board's conclusion that the Independent was a company-dominated union seems based heavily upon findings which are not free from ambiguity and doubt. We believe that the Board, and not this Court, should undertake the task of clarification."

After pointing out that the Board had found the bulletin and speeches had interfered with, restrained and coerced the employees, and that the company contended that this finding was repugnant to the First Amendment, the Court held that the Act did not enjoin the employer from expressing his views on labor policies or problems, but that conduct evidenced in part by speech might amount to coercion in connection with other circumstances. It then went on to say:

"If the Board's order here may fairly be said to be based on the totality of the company's activities during the period

in question, we may not consider the findings of the Board as to the coercive effect of the bulletin and the speeches in isolation from the findings as respects the other conduct of the company. If the Board's ultimate conclusion is based upon a complex of activities, such as the anti-union background of the company, the activities of Bishop, Edwards' warning to the employees that they would be discharged for 'messing with the C. I. O.', the discharge of Mann, the quick formation of the Independent, and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the company said in conjunction with what it did."

And, as showing that the case was remanded merely for a determination by the Board as to whether or not domination was shown by the evidence without reference to the bulletin and speeches, or whether or not it was shown by the whole course of conduct evidenced in part by these utterances, and that these questions were held to be questions [fol. 315] for the Board upon the evidence, the following portion of the opinion is pertinent:

"It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. The bulletin and the speeches set forth the right of the employees to do as they please without fear of retaliation by the company. Perhaps the purport of these utterances may be altered by imponderable subtleties at work which it is not our function to appraise. *Whether there are sufficient findings and evidence of interference, restraint, coercion, and domination without reference to the bulletin and the speeches, or whether the whole course of conduct evidenced in part by the utterances was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence.*

"Here we are not sufficiently certain from the findings that the Board based its conclusion with regard to the Independent upon the whole course of conduct revealed by this record. Rather it appears that the Board rested heavily upon

findings with regard to the bulletin and the speeches the adequacy of which we regard as doubtful. We therefore remand the cause to the Circuit Court of Appeals with directions to remand it to the Board for a redetermination of the issues in the light of this opinion." (Italics supplied.)

The Board has reappraised the evidence in the light of the Supreme Court's opinion and has found interference, restraint, coercion and domination on the whole evidence and in consideration of the whole "complex of activities" shown by the evidence. This was done, not by the same Board, but by a Board with a completely changed membership. It was done, not pro forma, but in a careful appraisal of the circumstances relied on. In the first decision of the Board, the conclusions regarding the I. O. E. were contained in two of the printed pages of the record before us. In the last decision, these conclusions cover more than [fol. 316] fourteen pages, in which the Board's evaluation of the circumstances is fully set forth. With respect to the April 26 bulletin, the Board states its conclusions as follows:

"As regards the April 26 bulletin, we are not unmindful of the respondent's argument that its reference to the employees' right to join the union of their choice and its statement that no employee would suffer because of his member ship, assured the employees of its impartiality, and that hence the employees could not have been restrained in their choice of representatives by any statement contained in the bulletin. We do not agree, however, that the respondent's brief reference to the employees' rights under the Act rendered the employees wholly free with respect to joining unions. On the contrary, in view of the respondent's past hostility to labor organizations, and in view of the timing of the bulletin, after nationally affiliated organizations had attempted to organize the employees and at a time when the Supreme Court decisions sustaining the validity of the Act rendered further attempts imminent, we believe that the employees could not fail to be discouraged from joining 'national' labor organizations by the respondent's action in posting the bulletin, which, as a whole, so clearly showed the respondent's opposition to their taking such a step. The respondent's subsequent activities, including its successful

effort to effect the formation of a company-wide organization and the discharge of Mann because of his opposition to such an organization, cast revealing light on the respondent's motives in posting the bulletin. Viewing the bulletin in the light of the background in which it was posted and the respondent's subsequent activities, we find the bulletin clearly coercive. We accordingly find that the posting of the bulletin was an integral part of the respondent's conduct, and as such, interfered with, restrained, and coerced the respondent's employees in the exercise of the rights guaranteed in sec. 7 of the Act."

That the speeches were appraised in the light of the other evidence, and not held coercive without reference thereto appears from the following passages of the conclusions:

"We cannot agree that the message left the employees the complete and unfettered freedom of choice of representatives contemplated by the Act. Evaluating the message as [fol. 317] a whole in the light of the respondent's long-standing opposition to the organization of the employees, the anti-union activities of Superintendent Bishop, the bulletin of April 26 appealing to the employees to ignore the overtures of the organizers of nationally affiliated organizations, the discharge of Mann for advocating affiliation with a 'national' union, and the respondent's subsequent support of the proponents of the I. O. E. and interference with the activities of the adherents of nationally affiliated organizations, and giving due regard to the sensitivity of employees to even subtle expressions of preference on the part of their employers, we find that the respondent, in urging upon the employee representatives the formation of a bargaining agency of their 'own,' impaired the employees' free choice of representatives, notwithstanding the respondent's reference in the message to the employees' rights under the Act.

"Upon all the facts, we are convinced and find that the May 24 meetings were arranged and the respondent's message to the employees was prepared for the purpose of bringing about the formation of a company-wide unaffiliated organization. The messages themselves contain, as we have found above, a thinly disguised plea for the formation of just such an organization. Had not the respondent been determined to effect the formation of such an organization there would have been no lawful occasion for the respon-

dent's arranging the May 24 meetings as it did, for it had only recently 'advised' the employees concerning their rights under the Act. The whole procedure of the May 24 meetings was obviously chosen with a view to facilitating the formation of the desired organization. Not satisfied with the bulletin board method of transmitting messages to the employees, which the respondent had utilized in the past, this time the respondent delivered its message personally to representatives of the employees chosen at the respondent's behest. This strategy enabled the respondent to obtain a spokesman for its project in almost every department. The device of withdrawing from the meeting places and suggesting that the employee representatives remain for further discussion, we believe was intended to give them an opportunity to formulate their plans before consulting with their constituents and thus to expedite the formation of an organization. We conclude, therefore, that the respondent arranged the meetings and urged upon the employees the formation of a company-wide unaffiliated or-
[fol. 318] ganization because it feared the course the employees might pursue if the respondent did not intervene, that the respondent did so in a further effort to control the exercise by its employees of their right to self-organization, and that in doing so the respondent injected itself into a sphere of activity reserved exclusively to its employees and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in sec. 7 of the Act."

After summarizing the evidence and evaluating its several features at greater length than we would be justified in quoting here, the Board states its conclusion with respect to the I. O. E. as follows:

"Upon all the facts summarized above, we conclude that the I. O. E. was not the result of the employees' free choice; that it was initiated in response to the urgings of the respondent at the May 24 meetings to set up their 'own' organization; that the respondent's support of the organization during the critical formative period and its consistent opposition to nationally affiliated organizations are largely responsible for the adherence of the employees to the organization; and that the contract with the I. O. E. granting a closed shop and the check-off of the I. O. E. dues marked

the climax of the respondent's efforts to erect an unaffiliated organization as a bulwark against nationally affiliated organizations. We find that the respondent has dominated and interfered with the formation and administration of the I. O. E. and has contributed support to it, and has in this and the other respect set forth above interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in section 7 of the act."

And apart from the doctrine of the "law of the case", we feel that in the light of the clear intimation of the Supreme Court as to the sufficiency of the evidence to sustain a finding of domination we would not be justified in holding it insufficient. In referring in the language above quoted to "the anti-union background of the company, Edwards' warning to the employees that they would be discharged for 'messing with the C. I. O.', the discharge of Mann, the quick formation of the Independent, and the part which the management may have played in that formation", the court [fol. 319] ascribed probative value on the issue of domination to these circumstances which we do not feel that we should ignore. The last decision of the Board considers these in connection with the bulletin and speeches and points to other probative features of the testimony not fully appraised in its former decision. We are admonished in the Supreme Court's decision that "we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act"; and other recent decisions of the court have emphasized that findings of the Board are binding, not merely with respect to evidentiary facts, but also with respect to conclusions of fact which may reasonably be drawn from them. Cf. *Gray* v. *Powell*, 314 U. S. 402, 62 S. Ct. 326.

Having reached this conclusion, we feel that we should express it as an additional ground of decision, to the end that there may be a final decision of the case by the Supreme Court, if certiorari is granted, whatever that court's view may be as to the applicability of the doctrine of the "law of the case". The fact that the conclusion is at variance with that reached by us on the former appeal does not militate against it. We did not then have the benefit of the analysis of the evidence contained in the Board's last decision, nor did we have the light of the Supreme Court's opinion. Our duty is to decide the question now presented

in the light of the present situation and not that which existed at the time of the former appeal; and if, in consideration of the subsequent decisions of the Supreme Court and the fuller discussion of the evidence by the Board, it appears that we were mistaken in applying to the record before us standards which the Supreme Court prescribes, that mistake can furnish no precedent for present action. We unhesitatingly admit and correct error, whether of law or fact, when pointed out by counsel on petition for rehearing. We should not hesitate to do so, when the error is pointed out by opinions of the Supreme Court.

Little need be said as to the discharges. As to the discharge of Mann, if the evidence of background has probative value on the issue of company domination, it is unquestion-[fol. 320] ably sufficient to sustain the Board's finding as to his discriminatory discharge. See our recent decision in *Hickory Chair Mfg. Co.* v. *N. L. R. B.*, 4 Cir. — F. 2d —(decided Nov. 12, 1942). The finding that the I. O. E. was company dominated brings within the category of unfair labor practices the discharge of Staunton because he would not become a member thereof in accordance with the closed shop agreement.

With respect to that portion of the order which directs reimbursement of employees for amounts paid to the I. O. E. under the check-off provision of the contract, we have a situation where, under contract with a company dominated union, the company made deductions from wages and paid them to the union. It is true that each employee, in his application for membership in the I. O. E., authorized that this be done; but as the contract contained a closed shop provision, he had no option but to submit to the deduction if he desired to retain his employment. Under such circumstances, the check-off was unquestionably an unfair labor practice; and the Board has found that reimbursement of employees for the wages thus deducted is necessary to expunge it. With respect to this matter, the Board said:

"We are of the opinion that, under the circumstances of this case, the respondent should be ordered to reimburse each employee for any amounts which the respondent has deducted from his wages for dues and assessments in the I. O. E. The respondent concluded a closed-shop contract with the I. O. E., a company-dominated organization, thus compelling its employees to become and remain members

of the illegal organization. Employees were in fact discharged because they refused to join the I. O. E. The check-off provision, a device by which the respondent assured the financial stability of the company-dominated organization, could no more be avoided by the employees than could the compulsory membership requirement. The by-laws of the I. O. E. required its members to execute check-off authorizations under penalty of being dropped from membership in the I. O. E., and thereby, under the closed-shop provision, from their jobs. We find that the monies thus deducted from the wages of the employees constituted the price of [fol. 321] retaining their jobs, a price coerced from them for respondent's purpose of supporting and maintaining the organization which respondent had dominated in order to thwart bona fide representation. We further find that, as a result of the imposition of the illegal closed-shop and check-off requirements, the employees suffered a definite loss and deprivation of wages equal to the amounts deducted from their wages and paid over to the I. O. E. It is appropriate that the employees be made whole by reimbursement of amounts exacted from them for illegal purposes. We find that in these circumstances, the effects of the unfair labor practices may be fully remedied and the purposes and policies of the Act may be completely effectuated only by restoring the status quo. Hence, we shall order the respondent to reimburse its employees for the amounts deducted from their wages for dues and assessments in the I. O. E."

Under section 10(c) of the *National Labor Relations Act*, 49 Stat. 454, 29 U. S. C. A. 160 (c), the Board has the power, upon a finding of unfair labor practice, not only to require the person guilty thereof to cease and desist therefrom, but also to require him "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act". It is clear, we think, that such affirmative action is not limited to "reinstatement of employees with or without back pay". As said by Judge Arant in the dissenting portion of his opinion in *N. L. R. B.* v. *West Kentucky Coal Co.*, 6 Cir. 116 F. 2d 816, 821, "the specification did not add to the Board's power, but illustrated the kind of affirmative order the Board could make". An order requiring reimbursement of the check-off under such circumstances as exist here clearly falls within

the power and is closely analogous to orders directing the payment of back wages in case of discriminatory discharge. In the case of discriminatory discharge, the employee has lost wages as the result of an unfair labor practice, and the payment of back wages is ordered to wipe out so far as possible the effect of the practice and effectuate the purposes of the act. Here, the employees have just as certainly lost the wages deducted under the check-off agreement, which because of the payment to a company dominated union is [fol. 322] also an unfair labor practice. It is for the Board, and not for us, to say what affirmative action is necessary to expunge the effect of such practice and effectuate the purposes of the act. *Phelps-Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194; *N. L. R. B.* v. *Link Belt Co.*, 311 U. S. 584, 600; *International Ass'n of Machinists* v. *N. L. R. B.*, 311 U. S. 73, 82; *N. L. R. B.* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250; *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271.

It is true, of course, that the Board may not, under the guise of effectuating the purposes of the act, impose penalties or adjudicate tort claims. Cf. *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7. An order directing reimbursement of wages deducted pursuant to an unfair labor practice, however, does not fall within either of these categories. As said by Judge Hutcheson in *Agwilines, Inc.* v. *N. L. R. B.*, 5 Cir. 87 F. 2d 146, 151:

"The statute authorizes reparation orders not in the interest of the employee, but in the interest of the public. A cease and desist order operating retrospectively is not a private award, operating by way of penalty or of damages. It is a public reparation order, operating retrospectively by way of an order to cease and desist as to unfair practices, from their beginning; practices as to which, because forbidden in the interest of industrial amity, and therefore peace, Congress has the right to eradicate them as from the beginning."

We are advertent to the decisions refusing to enforce orders of the Board directing reimbursement of wages deducted under the check-off.[*1] We are not impressed, how-

[*1] *Western Union Telegraph Co.* v. *N. L. R. B.*, 2 Cir. 113 F. 2d 992; *Corning Glass Works* v. *N. L. R. B.*, 2 Cir. 118 F. 2d 625; *N. L. R. B.* v. *West Kentucky Coal Co.*, 6 Cir. 116 F.

[fol. 323] ever, with the reasoning of those which proceed upon the theory that the action of the Board amounts to the imposition of a penalty or the adjudication of a tort claim beyond its powers or that its action must be set aside because contravening equitable principles. We note that in only three of the cases[*2] was there a check-off under an agreement involving a closed shop, that two of these were from one circuit, and that the first of these two called forth a dissenting opinion more convincing to us than the opinion of the court.[*3] And in the case of *Kansas City Power & Light Co.*, Judge Stone, speaking for the Circuit Court of Appeals of the 8th Circuit, points out that while the case there involved did not justify an order of reimbursement, situations might arise which would justify such order, and distinguished from the case before him such a case as we have here, where the company initiated, formed and promoted the organization and assured its support by agreeing to the check-off. Judge Stone said in that case:

"There may be situations which would justify such an order. This is not one. The proposition for a check-off as a method of collecting dues originated with the Association, was opposed by the company and conceded only upon demand of the Association. Such dues were fixed solely by the Association and used solely in its activities. This is not an instance where the company initiated, formed and promoted an organization and assured its support through a check-off. It is an instance of the effect of a prior organization (the Plan) carrying over an influence which might

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2d 816; *N. L. R. B.* v. *United States Truck Co.*, 6 Cir. 124 F. 2d 887; *N. L. R. B.* v. *J. Greenebaum Tanning Co.*, 7 Cir. 110 F. 2d 984; *A. E. Staley Mfg. Co.* v. *N. L. R. B.*, 7 Cir. 117 F. 2d 868; *Reliance Mfg. Co.* v. *N. L. R. B.*, 7 Cir. 125 F. 2d 311; *Kansas City Power & Light Co.* v. *N. L. R. B.*, 8 Cir. 111 F. 2d 340; *N. L. R. B.* v. *Southwestern Greyhound Lines, Inc.*, 8 Cir. 126 F. 2d 883; *N. L. R. B.* v. *Continental Oil Co.*, 10 Cir. 121 F. 2d 120.

[*2] *N. L. R. B.* v. *West Kentucky Coal Co., supra; N. L. R. B.* v. *United States Truck Co., supra; N. L. R. B.* v. *J. Greenebaum Tanning Co., supra.*

[*3] Opinion of Judge Arant in the *West Kentucky Coal Co., case, supra.*

affect the entire freedom of employees to choose their bargaining agent."

It is argued that there is no occasion for reimbursement since the dues were paid to the I. O. E. on the order of the employees; but this circumstance loses significance when it is remembered that the I. O. E. is found to have been in-[fol. 324] itiated and promoted by the company for the purpose of defeating that collective bargaining which the Act contemplates, and that the employees were obliged to pay dues to it as a means of retaining their employment. It is argued, also, that the employees got the benefit of the check-off as the result of the payment to the union of which they were members. The answer, of course, is that the Act proceeds upon the theory that the maintenance of a company dominated union is not a benefit but a detriment to the employees who are members of it. And it is no answer to this to point to wage increases and other benefits secured as a result of contracts made by the company dominated union; for it is manifestly impossible to say that greater benefits might not have been secured if the freedom of choice of a bargaining agent had not been interfered with. It must be remembered, however, as above indicated, that it is not the redress of wrongs of employees which is the purpose of the order complained of, but the expunging ab initio of the effects of an unfair labor practice. The mere disestablishment of the company dominated union does not accomplish this result. It is accomplished only when action is taken which will place the parties, so far as possible, where they would have been if the unfair labor practice had not occurred. One means of doing this is to reimburse the employees for anything they may have been deprived of as a result of it. Cf. *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 12. The whole matter was well summed up by Judge Arant in the dissenting portion of his opinion in *N. L. R. B.* v. *West Kentucky Coal Co., supra*, 116 F. 2d 816, 820-821, as follows:

"The order to reimburse for wrongful checkoffs, though not specifically mentioned in the Act, is analogous to the order to make employees whole by the payment of back wages and promotes the policies of the Act in the same manner. The writer thinks reinstatement with back pay would have been authorized by sec. 10(c) even if it had not been specified; the specification did not add to the Board's power,

but illustrated the kind of an affirmative order the Board could make. A proceeding before the Board is not an action at law, and the Board's order does not redress wrongs to [fol. 325] individual employees. Though the order sometimes provides for deductions from back pay to the extent of earnings between dismissal and reinstatement, no case has been noted in which the employer was allowed to deduct an amount the employee *might* have earned had he used reasonable diligence to find another job. The wrongful checkoff of dues is neither more nor less tortious than wrongful dismissal; in neither case is there an inquiry as to extent of injury, as the Second Circuit rightly insists there should be in tort actions. The truth is that reinstatement of the employee and payment for time lost are remedies not known to the common law but created by statute. They 'are requirements imposed for violation of the statute and are remedies appropriate to its enforcement.' Mr. Chief Justice Hughes, in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 48, 57 S. Ct. 615, 629, 81 L. Ed. 893, 108 A. L. R. 1352. 'The procedure the statute outlines is not designed to award, the orders it authorizes do not award, damages as such. The proceeding is not, it cannot be made, a private one to enforce a private right. It is a public procedure, looking only to public ends.' Hutcheson, J., Agwilines, Inc. v. N. L. R. B., 5 Cir., 87 F. 2d 146, 150."

For the reasons stated, the petitions to set aside the Board's order will be denied and the order will be enforced.

Order Enforced.

DISSENTING OPINION

SOPER, Circuit Judge, Dissenting in Part:

I concur in the result reached by the court in its opinion except insofar as it approves that part of the order of the Board which requires the Power Company to reimburse its employees for all of the dues deducted from their wages for the benefit of the independent organization. The argument in favor of the order is that since the checkoff was associated with the closed shop, the monies deducted from the wages of the men constituted payments made by them under the fear of losing their jobs; and that repayment is [fol. 326] necessary to offset the coercive measures of the

company and to effectuate the purposes of the Act. Similar arguments have been rejected by five Circuit Courts of Appeals in every case in which the exercise of the power has been attempted.

The facts in the present case in this regard are that the closed shop and checkoff were forced upon the company against its will by the independent organization; that no employee now seeks the return of his money; and that the company received no financial or other benefit from the payments, since they were turned over to the independent organization and used by it in successful efforts to secure substantial advantages for the employees in wages and working conditions. Under these circumstances there is no justice in ordering the return of the money for which the men have received their money's worth. Nor is there merit in the contention that the money should be returned because it was paid under compulsion. There is an element of duress in every closed shop wherein workmen are compelled to recognize the union and to pay the required dues, but these conditions are considered lawful because they are imposed upon the employees by their own action. There is no greater compulsion in the case of a company dominated union, when the closed shop and checkoff fees result from the voluntary action of the men and are accepted by the company against its desire in order to preserve industrial peace. It may be added that there is no greater reason to require a return of the wages checked off in this case than to recompense employees in every case for dues paid directly to a company union.

The effect of this provision of the Board's order is not to effectuate the policies of the Act, for that is done completely by the disestablishment of the independent organization whereby the freedom of the employees to choose their own representatives is made secure. The effect is merely to obtain the deterrent influence that is expected to flow from the imposition of a penalty. But the Supreme Court has held that the Board has no power to inflict punishment for its deterrent effect. In *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7, 11, 12, the court, speaking of the [fol. 327] power of the Board to take such affirmative action as will effectuate the policies of the Act, said:

"This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually un-

limited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 235, 236. See, also, National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, 267, 268. We adhere to that construction.

"In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end."

[fol. 328] In United States Circuit Court of Appeals, Fourth Circuit

No. 5013

Virginia Electric and Power Company, Petitioner,

vs.

National Labor Relations Board, Respondent

On Petition for Review of an Order of the National Labor Relations Board

Decree—Filed and Entered December 9, 1942

This Cause came on to be heard upon the petition of the Virginia Electric and Power Company to review and set aside a certain order issued against it by the National Labor Relations Board on the 24th day of September, 1942, in proceedings before said Board numbered C-914, C-915 and C-916, entitled "In the Matter of Virginia Electric and Power Company and Transport Workers Union of America", "In the Matter of Virginia Electric and Power Com-

pany and Amalgamated Association of Street, Electrical Railway and Motor Coach Employees of America, an unincorporated association", and "In the Matter of Virginia Electric and Power Company and International Brotherhood of Electrical Workers"; upon the answer of said Board and request for enforcement, and upon the transcript of record in said proceedings certified and filed in this Court; and the said cause was argued by counsel.

On Consideration Whereof, it is ordered, adjudged, and decreed by the United States Circuit Court of Appeals for the Fourth Circuit, that said order of the National Labor Relations Board in said proceedings, be, and the same is hereby, enforced, and that the said Virginia Elec-
[fols. 329-342] tric and Power Company abide by and perform the directions of the Board in said order contained.

John J. Parker, Senior Circuit Judge. —— ——, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

I dissent in part, as shown by the opinion filed herein.
Morris A. Soper, United States Circuit Judge.

[File endorsement omitted.]

[fol. 343] In Supreme Court of the United States, October Term, 1942

[Title omitted]

Stipulation as to Record

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that for the purposes of the petition for a writ of certiorari, the printed record may consist of, and that if a writ of certiorari be granted, the record upon which this case shall be heard shall consist of, the following:

1. The printed Transcript of Record heretofore filed in this case in this Court *sub nom.* National Labor Relations Board, Petitioner, vs. Virginia Electric and Power Company and National Labor Relations Board, Petitioner, vs. The Independent Organization of Employees of Virginia Electric and Power Company, Nos. 25 and 26, October Term 1941.

2. The following additional papers, namely:

(a) The opinion of this Court in this case dated December 22, 1941;

(b) The order of the National Labor Relations Board in this case dated April 3, 1942;

(c) The decision and order of the National Labor Relations Board in this case dated September 24, 1942;

[fol. 344] (d) The opinion of the United States Circuit Court of Appeals for the Fourth Circuit in this case dated December 9, 1942; and

(e) The order of the United States Circuit Court of Appeals for the Fourth Circuit in this case dated December 9, 1942.

Subject to this Court's approval, it is further stipulated and agreed that there need be no reprinting of the Transcript of Record referred to in 1 above but that said petition, and the case if said writ be granted, may be submitted on such copies of the original printing as may remain available.

Subject to this Court's approval, it is further stipulated and agreed that petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court the entire record certified and filed by said Board in said Circuit Court of Appeals or otherwise on file in this case in the Clerk's office of said Circuit Court of Appeals.

It is further stipulated and agreed that, if it should become necessary, additional portions of the certified record may be designated to be printed by either of the parties hereto, and, upon being printed, such additional portions shall be deemed part of the record herein.

Charles Fahy, Solicitor General of the United States.

Dated at Washington, D. C., this 28 day of December, 1942.

Hunton, Williams, Anderson, Gay & Moore, Attorneys for Virginia Electric and Power Company.

Dated at Richmond, Virginia, this 23d day of December, 1942.

[fol. 345] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 709

ORDER ALLOWING CERTIORARI—Filed March 15, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.